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TRANSCRIPT OF RECORD

#37028
Ct. App. D.C.

Supreme Court of the United States

OCTOBER TERM, 1942

No. 173

THE UNITED STATES OF AMERICA EX REL. MORRIS L. MARCUS, AND MORRIS L. MARCUS IN HIS OWN BEHALF, PETITIONERS,

vs.

WILLIAM F. HESS, ET. AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 23, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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APPENDIX.

In The
DISTRICT COURT OF THE UNITED STATES
For The
Western District of Pennsylvania

No. 748 Civil Action

United States of America on relation of Morris L. Marcus, and Morris L. Marcus in his own behalf,

v.

William F. Hess, John R. Williams, Thomas G. Hoddon, Thomas G. Hoddon, Jr., C. W. Ridinger, Jr., C. W. Ridinger, Sr., Warren I. Bickford, Edwin C. Carter, James V. Burke, G. L. Craig, William S. Taczanowsky, Ralph M. Morganstern; Max Daniels, Alvin S. MacNeil, Walter C. Gloekler, Robert B. Yates, H. L. Fullerton, Robert C. Carmack, K. K. Wood, Louis H. Berkman, Edward B. Sargent, individually and doing business as Sargent Engineering Company, Robert N. Morris, individually and doing business as Morris Engineering Company, Charles M. Cronenweth, individually and doing business as Cronenweth Electric Company, William C. Hemmerle, individually and doing business as W. C. Hemmerle Electric Company, James C. Devlin, individually and doing business as Devlin Electric Construction Company, Norman B. Leeke, individually and doing business as Diamond Electric Company, Herbert D. Hale, individually and doing business as H. D. Hale Electric Company, James A. Rodden, individually and doing business as Rodden Electric Company, Richard W. Schindler, individually and doing business as R. W. Schindler Electric Company, Donald R. Ross, individually and

doing business as D. R. Ross Electric Company, James H. Stauffer, individually and doing business as Stauffer Electric Company, John W. Craig, individually and doing business as J. W. Craig Electric Company, R. G. Diodati, individually and doing business as R. G. Diodati and Bro., Irwin J. Levinson, individually and doing business as Levinson Electric Company, Bernard A. Ross, individually and doing business as Ross Electric Company, John E. Hale, individually and doing business as Hale Electric Company, Walter F. Weberg and J. R. Walter, individually and as partners, doing business as Fort Pitt Electric Company, Winfield S. Martin and Michael J. Murray, individually and as partners, doing business as Martin and Murray, Benjamin Raphael and Israel Raphael, individually and as partners, doing business as Raphael Electric Company, Hess and Barton, Franklin Electric and Construction Co., Iron City Engineering Co., Carter Electric Co., Craig Electric Co., G. L. Craig Electric Co., Morganstern Electric Co., Inc., Daniels Electric Construction Co., MacNeil Electric Co., Star Electric and Construction Co., Industrial Electric Co., Electrical Contractors Association of Pittsburgh, Inc., Lord Electric Co.

Relevant Docket Entries.

1940		
Jan.	25,	Complaint filed.
May	13,	Answer of C. W. Ridinger, Sr. and Jr., Warren I. Bickford and Iron City Engineering Co. filed with acceptance of service thereon.
Nov.	1,	Praecipe for appearance of Wm. Eckert, Eugene Strassburger and J. V. Burke, Jr. for defendants filed.
"	"	Amendment to answer of all defendants filed by leave of Court.

Nov. 4, Plaintiffs' reply to the second defense of defendants' amended answer filed.

" 14, Second amendment to answer of all defendants filed by leave of Court; *Eo die,* exception noted to plaintiffs and bill sealed.

" 19, Motion to strike and answer to plaintiff's motion for inspection of minutes of testimony before Grand Jury filed by Geo. Mashank, Acting U. S. Attorney.

" " Notice of motion, and acceptance of service; motion of plaintiff for inspection of minutes of testimony before the Grand Jury, filed.

" " Hearing on application for examination of testimony taken before the Grand Jury at 10462 Crim., before Schoonmaker, J.

" " Trial memo filed.

" 26, Plaintiffs' reply to the second amendment to answer of all defendants filed. Withdrawal of motion for inspection of minutes of Testimony before the Grand Jury filed and order entered granting said motion filed.

1941

Mar. 21, Point of C. W. Ridinger, Sr. for binding instructions refused and filed.

" " Points of defendants other than Robert Carmack for instructions to jury filed and some affirmed, others refused.

" " Points of defendants other than Robert Carmack for binding instructions filed and refused.

" 22, The jury find a verdict in favor of plaintiff and against all defendants except Robert C. Carmack in the sum of $315,100.91 being $203,100.91 damages and $112,000.00 penalty, and as to defendant Robert C. Car-

mack, a verdict in his favor—verdict filed. Jury polled.

Mar. 22, Pursuant to above verdict judgment is hereby entered in favor of plaintiff and against all defendants except Robert C. Carmack in sum of $315,100.91.

G. H. BERGER, *Clerk* (*J.ent.*)

Apr. 1, Motion for new trial filed.

" " Motion for judgment on reserved points filed by leave of court for all defendants other than Robert C. Carmack.

" " Motion for judgment on reserved point as to C. W. Ridinger, Sr., filed by leave of court.

" 15, Hearing on motion for judgment on reserved point before Schoonmaker, J. CAV.

Aug. 12, Opinion filed denying defendants' motion for new trial, Schoonmaker, J.

" 13, Order of Court filed and entered in accordance with above Opinion denying motion for new trial and refusing judgment on reserved point.

Sept. 19, Notice of appeal filed by defendants.

Nov. 8, Points to be raised on appeal filed by defendant with acceptance of service thereon, on Nov. 7, 1941.

" " Designation of record on appeal filed with acceptance of service thereon on Nov. 7, 1941.

" 22, On motion of appellees order entered extending time in which to file designation of additional portions of record to November 28, 1941; the appellant excepts to this order.

" 28, Appellees' designation of record on appeal filed with acceptance of service thereon.

Complaint.

UNITED STATES OF AMERICA on relation of MORRIS L. MARCUS and MORRIS L. MARCUS, in his own behalf, plaintiffs above named, bring this civil action against WILLIAM F. HESS, ET AL., defendants above named on a cause of action whereof the following is a statement:

1. MORRIS L. MARCUS, the relator, is a citizen of the United States, residing in the City of Pittsburgh, County of Allegheny, State of Pennsylvania and that he institutes and prosecutes this action in the name of and for and on behalf of The United States of America and in his own behalf under and in pursuance of the statutes of the United States, in such cases made and provided by reason of Sections 231, 232, 233, 234 and 235 of Title 31 of the United States Code Annotated.

2. The defendants, William F. Hess, Edward B. Sargent, Robert N. Morris, John R. Williams, Walter F. Weberg, J. R. Walter, Thomas G. Hodgdon, Thomas G. Hodgdon, Jr., Benjamin Raphael, Israel Raphael, C. W. Ridinger, Sr., Warren I. Bickford, C. W. Ridinger, Jr., Edwin C. Carter, James V. Burke, G. L. Craig, William S. Taczanowsky, Charles M. Cronenweth, John E. Hale, William C. Hemmerle, Ralph M. Morganstern, Max Daniels, James C. Devlin, Norman B. Leeke, Herbert D. Hale, Alvin S. MacNeil, Robert B. Yates, Winfield S. Martin, Michael J. Murray, James A. Rodden, Donald R. Ross, Richard W. Schindler, Walter C. Gloekler, James H. Stauffer, K. K. Wood, H. L. Fullerton, Louis H. Berkman, John W. Craig, R. G. Diodati, Irwin J. Levinson, Bernard A. Ross, Robert C. Carmack, are citizens of the United States and residents of the County of Allegheny and State of Pennsylvania, and that at all times hereinafter mentioned said defendants were and still are such citizens and residents and subject to the provisions of the Laws of the United States.

3. That at all times hereinafter mentioned Hess & Barton, Franklin Electric and Construction Co., Iron City Engineering Co., Carter Electric Co., Craig Electric Co., G. L. Craig Electric Co., Morganstern Electric Co., Inc., Daniels Electric Construction Co., MacNeil Electric Co., Star Electric and Construction Co., Industrial Electric Co., Electrical Contractors Association of Pittsburgh, Inc., defendants above named were and now are corporations duly organized and existing under and by virtue of the laws of the State of Pennsylvania, having their respective principal places of business in the County of Allegheny, State of Pennsylvania and at all times hereinafter mentioned the Lord Electric Company was and is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having its principal place of business in said County of Allegheny, State of Pennsylvania.

4. That during all or a part of the time hereinafter mentioned, the above named corporations and the following named persons were engaged in the business of electrical contracting, carrying on business in and about said County of Allegheny, State of Pennsylvania, and were members of said Electrical Contractors Association of Pittsburgh, Inc., that is to say:

William F. Hess was and is President of Hess & Barton; Edward B. Sargent was and is owner of Sargent Engineering Company; Robert N. Morris was and is owner of Morris Engineering Company; John R. Williams was and is Vice President of Lord Electric Company; Walter F. Weberg and J. R. Walter were and are partners doing business as Fort Pitt Electric Company; Thomas G. Hodgdon was and is President and Thomas G. Hodgdon, Jr., was and is Secretary of Franklin Electric & Construction Company; Benjamin Raphael and Israel Raphael were and are partners doing business as Raphael Electric Company; C. W. Ridinger, Sr. was and is President, Warren I. Bickford was and is Secretary

and Treasurer, and C. W. Ridinger, Jr., was and is Manager of the Iron City Engineering Company; Edwin C. Carter was and is President of Carter Electric Company; James V. Burke was and is President of Craig Electric Company; G. L. Craig was and is Secretary and William S. Taczanowsky was and is President of G. L. Craig Electric Company; Charles M. Cronenweth was and is owner of Cronenweth Electric Company; John E. Hale was and is owner of Hale Electric Company; William C. Hemmerle was and is owner of W. C. Hemmerle Electric Company; Ralph M. Morganstern was and is President of Morganstern Electric Company, Inc.; Max Daniels was and is President of Daniels Electric Construction Company; James C. Devlin was and is owner of Devlin Electric Construction Company; Norman B. Leeke was and is owner of Diamond Electric Company; Herbert D. Hale was and is owner of H. D. Hale Electric Company; Alvin S. MacNeil was and is President and Robert B. Yates was and is Vice President of MacNeil Electric Company; Winfield S. Martin and Michael J. Murray were and are partners doing business as Martin & Murray; James A. Rodden was and is owner of Rodden Electric Company; Donald R. Ross was and is owner of D. R. Ross Electric Company; Richard W. Schindler was and is owner of R. W. Schindler Electric Company; Walter C. Gloekler was and is President of Star Electric & Construction Company; James H. Stauffer was and is owner of Stauffer Electric Company; K. K. Wood operated as an electrical contractor under his own name; John W. Craig was and is owner of J. W. Craig Electric Company; R. G. Diodati was and is owner of R. G. Diodati and Bro.; Irwin J. Levinson was and is owner of Levinson Electric Company; Bernard A. Ross was and is owner of Ross Electric Company; and that William F. Hess was and is President of said Electrical Contractors Association of Pittsburgh, Inc.; and Robert C. Car-

mack was and is Manager of said Electrical Contractors Association of Pittsburgh, Inc.

5. The defendants at all times hereinafter mentioned were not and are not in the military or naval forces of the United States or in the militia called into or actually employed in the service of the United States.

6. The acts of the defendants above named and each of them were done by the defendants in contravention and violation of the provisions of the laws and statutes of the United States, and more particularly the following:

"Sec. 80. (Criminal Code, section 35, amended.) Presenting false claims; aiding in obtaining payment thereof. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same

to contain any fraudulent or fictitious statement or entry, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (R. S. Sec. 5438; May 30, 1908, c. 235, 35 Stat. 555; Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015.)"

Sec. 80—Title 18—U. S. C. A.

"Sec. 83. (Criminal Code, section 35, amended) Conspiracy to defraud United States in regard to allowance or payment of false claims. Whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (R. S. Sec. 5438; May 30, 1908, c. 235, 35 Stat. 555; Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015.)"

Sec. 83—Title 18—U. S. C. A.

7. That for the purposes of relieving destitution, providing relief, creating and increasing employment, expediting a Public Works program and providing for work upon and construction of useful Public Works and projects, the Congress of the United States enacted the following named Acts and Joint Resolutions, to wit:

The Emergency Relief and Construction Act of 1932 (47 Statutes at Large, 709) approved July 21, 1932; The Federal Emergency Relief Act of 1933 (48 Statutes at Large, 55), approved May 12, 1933; The National Industrial Recovery Act (48 Statutes at Large, 195) approved June 16, 1933; The Emergency Relief Appropriation Act of 1935 (49 Statutes at Large, 115), approved April 8, 1935; The Emergency Relief Appropriation Act of 1936

(49 Statutes at Large, 1608) approved June 22, 1936; The Emergency Relief Appropriation Act of 1937 (50 Statutes at Large, 352), approved June 29, 1937; The Public Works Administration Extension Act of 1937 (50 Statutes at Large, 357), approved June 29, 1937; The Work Relief and Public Works Appropriation Act of 1938 (52 Statutes at Large, 809), approved June 21, 1938;

And pursuant to such Acts and Resolutions and to the orders and rules promulgated under their authority, certain sums of money were appropriated for the purposes declared in such Acts and Resolutions, and out of said sums of money there were allocated certain sums of money to aid in the alteration, repair and construction of buildings for public schools, hospitals, playgrounds, and other similar construction projects in and about the City of Pittsburgh and the County of Allegheny in the Western District of Pennsylvania, which projects, by names and descriptions so far as they are known to the United States and your relator, plaintiffs above named are enumerated in Exhibit "A" attached hereto and made part hereof.

8. That for the purpose of aiding each of said projects, a grant of money not to exceed the amount set opposite the name and description of each project listed in said Exhibit "A" was made by the United States of America through the Federal Emergency Administration of Public Works (commonly referred to as the Public Works Administration) to the owner (sponsor, awarding Authority) whose name appears opposite the name and description of each project in said Exhibit "A".

9. That for the purpose of letting the contracts for the electrical work, and other work in connection with said projects, and each of them, the awarding Authority of each such project, sometimes herein also referred to as the "owner" or as the "sponsor", advertised and called for bids from persons, including the defendants

herein, seeking to obtain electrical and other contracts for the performance of the work called for by said projects.

10. That the defendants above named throughout a period of time beginning on or about the first day of January, 1935 and continuing each and every day thereafter until about the third day of November, 1939 in the County of Allegheny, Pennsylvania and elsewhere, did knowingly, willfully, unlawfully and feloniously conspire, combine, confederate, agree and have a tacit understanding together and with each other and with divers other persons unknown to the United States and your relator, plaintiffs above named, to defraud and otherwise injure and damage the United States, as is more particularly set forth hereinafter.

11. That, while keeping up an appearance of competition and conveying to awarding Authorities the idea and belief that said Defendant Electrical Contractors were rival bidders, the defendants agreed that they would abate honest rivalry, avoid and prevent competition, deceive the awarding Authorities, prevent transmission to awarding Authorities of bids and, in effect, secure in advance the awarding of contracts to one of the Defendant Electrical Contractors selected by them; and so defeat the plain intent and purposes of said Acts and Resolutions and defraud the United States, all to the mutual profit of the Defendants and to the injury and damage of the United States.

12. That on numerous occasions, the exact numbers and dates of which are unknown to the United States and your relator, plaintiffs above named, the Defendant Electrical Contractors would each prepare his separate bid for electrical work on that one of the projects described in Exhibit "A" on which bids were then being invited and they would and they did all meet together in and at the offices of the said Association in the Union Trust Building in Pittsburgh, Pennsylvania,

and elsewhere and thereupon each would and did disclose to all present, the amount of his proposed bid, an average of the proposed bid price would be obtained and the bidder whose bid price was nearest the average would be selected as the person to submit the low bid to the awarding Authority, whereupon all other defendant Electrical Contractors desiring to bid would so adjust their bid figures and amounts as to make the bid of the person so selected the lowest.

13. That on other numerous occasions, the exact numbers and dates of which are unknown to the United States and your relator, plaintiffs above named, said Defendant Electrical Contractors desiring to bid on electrical work on that one of the projects described in Exhibit "A", for which bids were then being invited would and they did transmit their intended bids, by mail or otherwise, to said Association at its offices aforesaid and elsewhere, where on some occasions, the numbers and dates of which are unknown to the United States and your relator, plaintiffs above named, Defendant Robert C. Carmack would and he did either average said bids and choose, select and appoint the person who was to thereafter submit the low bid to the awarding Authority, or a committee of members of said Association, whose names are unknown to the United States and your relator, would and they did choose, select and appoint the person who was to submit the low bid to the awarding Authority.

14. That on other numerous occasions, the exact numbers and dates of which are unknown to the United States and your relator, said Defendant Electrical Contractors desiring to bid on electrical work on that one of the projects described in Exhibit "A", for which bids were then being invited would and they did meet at the William Penn Hotel or the Roosevelt Hotel, or the Fort Pitt Hotel, in Pittsburgh, Pennsylvania and elsewhere,

and agreed amongst themselves as to who should submit the low bid.

15. It was a further part of said conspiracy that, after making such selection by whatever methods used, and in order to effectuate the same and procure the awards of contracts to the person chosen, selected and appointed, the Defendant Electrical Contractors would and they did alter, change, decrease, increase and adjust their proposed bid prices in such manner so that, when said Defendant Electrical Contractors thereafter submitted their bids to the awarding Authority, the bid price of the person theretofore so selected, chosen and appointed would be the lowest of all those submitted.

16. It was a further part of said conspiracy that Defendants William F. Hess, Robert C. Carmack, and others, by threats of present and future injury to business would and they did seek to prevent and did prevent nonmembers of said Electrical Contractors Association of Pittsburgh, Inc. from transmitting or submitting any bids to the awarding Authority and would and they did seek to prevent and did prevent members thereof from submitting or transmitting bids to the awarding Authority other than by the manners and means hereinbefore described.

17. That the defendants above named in carrying out the said conspiracy falsely and fraudulently executed and delivered or caused to be executed and delivered certain certificates containing substantially the following:

> "The undersigned hereby certifies that this Proposal is genuine and not sham or collusive, or made in the interest or in behalf of any person, firm or corporation not herein named, and that the undersigned has not, directly or indirectly, induced or solicited any other bidder to submit a sham bid, or any other person, firm or corporation to refrain from bidding, and that the undersigned has not in

any manner sought by collusion to secure for himself an advantage over any other bidder.

Firm name:

By:

Title:

Official Address:"

which certificates were false, fraudulent and fictitious and made for the purpose and with the intent of cheating and defrauding the Government of the United States.

18. That pursuant to the aforesaid conspiracy and in furtherance thereof, all of the aforesaid defendants through the fraudulent and unlawful conduct hereinbefore described did engage in sham and collusive bidding as above set forth, did falsely and fraudulently submit bids in furtherance of said conspiracy, did falsely and fraudulently receive awards and enter into said electrical contracts in furtherance of said conspiracy, did submit false and fraudulent written claims for payment thereof, did falsely and fraudulently receive from the United States Government large sums of money, and did make or cause to be made false and fraudulent statements or representations in regard to said bids and their claims thereon, and did make or use or cause to be made or used false and fraudulent certificate or certificates knowing the same to contain false and fraudulent or fictitious statements or entries for the purpose and with the intent of cheating and defrauding the Government of the United States, and that the Government of the United States was cheated and defrauded and sustained damages thereby in the following amounts on the following projects:

Official Designation	Description of Project	Damages sustained by the Government of the United States
Pa. 1633-F	McGee Playground	
Cont. 4	Bath & Field Hse.	$ 140.85
Pa. 1633-F	Cowley-Goettman Playground	
Cont. 9	Swimming Pools	$ 3,345.40
Pa. 1634-F	Burgwin Playground	
Cont. 4	Swimming Pool	$ 2,191.50
Pa. 1687-F	Concord Elementary School	
	School	$ 11,705.85
Pa. 1688-F	Schiller Elementary School	
	School	$ 12,474.00
Pa. 1689-F	Whittier Elementary School	
	School	$ 11,880.00
Pa. 1695-F	Blawnox Municipal Bldg.	
	Municipal Building	$ 1,198.35
Pa. 1907-F	South Vocational High School	
	School	$ 24,481.35
Pa. 1908-F	Miller Elementary School	
	School	$ 11,282.37
Pa. 1920 F	West View High School	
	High School	$ 19,771.20
Pa. 1600-F	Schenley Park	
Cont. 3	Comfort Sta.	$ 624.15
Pa. 1600-F	McKinley Park	
Cont. 7	Field House No. 2	$ 203.90
Pa. 1600-F	Sophia Evert Playground	
Cont. 14	Field House	$ 399.60
Pa. 1600-F	Townsend Playground	
Cont. 35	Field House	$ 204.75
Pa. 1600-F	Larimer Playground	
Cont. 37	Field House	$ 211.95
Pa. 1612-F	Sophia Evert Playground No. 2	
Cont. 4	Field House	$ 309.60
Pa. 1617-F	Arsenal Elementary School	
	School	$ 14,789.25

Official Designation	Description of Project	Damages sustained by the Government of the United States
Pa. 1618-F	Cresent Elementary School School	$ 16,289.10
Pa. 1935-F	East End Elementary School School	$ 4,811.40
Pa. 1975-F	Homerville Jr. High School School	$ 13,649.80
Pa. 1977-F	Siebert School School	$ 1,264.15
Pa. 1987-F Cont. 6	West Penn Playground Recreation Bldgs.	$ 4,646.70
Pa. 2016-F	Spring Garden Elementary School School	$ 10,813.50
Pa. 2017-F	West Liberty Elementary School School	$ 6,810.75
Pa. 2018-F	Thad. Stevens Elementary School School	$ 17,049.15
Pa. 2019-F	Girls Vocational School High School	$ 6,262.65
Pa. 2023-F	East Ohio St. Grade Crossing	$ 1,102.50
Pa. 2154-F	Leech Farm Tuberculosis Sanitarium	$ 23,857.00
Pa. 2224-F	Shaler Twp.—Softening Plant and Pumping Station	$ 8,596.00
Pa. 1692-DS	Braddock Jr. High School Jr. High School	$ 33,485.22
Pa. 1703-DS.	Crafton Municipal Bldg. Municipal Bldg.	$ 2,580.75
Pa. 7000	Mifflin Twp. Steam Heating Plant	$ 12,084.50
Pa. 7000 Cont. 3	North Park Bath House	$ 6,040.00
Pa. 7000-R Cont. 4-A	Municipal Airport Airport Electrical Facilities	$ 9,156.40
Pa. 7000-R Cont. 4-B	Municipal Airport Airport Electrical Facilities	$ 8,749.80

Official Designation	Description of Project	Damages sustained by the Government of the United States
Pa. 7000-R Cont. 4-D	Municipal Airport Airport Electrical Facilities	$ 10,020.10
Pa. 7000-R Cont. 4-E	Municipal Airport Airport Electrical Facilities	$ 7,980.70
Pa. 7000-R Cont. 4-F	Municipal Airport Airport Electrical Facilities	$ 9,324.60
Pa. 9616	North Park Boat House	$ 61,218.00
Pa. 1845-D	Western State Pen. Penitentiary	$ 23,219.00
Pa. 1649-F Cont. 7	Highland Park Zoo Cat Room	$ 405.35
Pa. 1456	Lincoln School Bldg. School Add.	$ 1,545.45
Pa. 2976 Cont. 206	Homestead High Level Bridge	$ 11,760.35
Pa. 2976 Cont. 305	Jerome St. Bridge	$ 6,066.00
Pa. 4242	County Home County Home	$ 51,416.66
Pa. 1924-F	Baldwin Twp. High School High School	$ 19,971.00
Pa. 7897	North Side Market Market	$ 5,625.00
Pa. 7501	Juvenile Court Court and Detention Home	$ 9,250.00
Pa. 1299	Perry High School High School & Athletic Field	$ 2,491.87
Pa. 1156	Spring Hill Elementary School School	$ 3,010.37
Pa. 1150	Carmalt Elementary School School	$ 8,501.50
Pa. 1392	Kenmar School School	$ 2,312.75

Official Designation	Description of Project	Damages sustained by the Government of the United States
Pa. 1317	Banksville Elementary School School	$ 9,243.37
Pa. 1303	Washington Trade School School	$ 26,461.12
Pa. 1302	Burgwin Elementary School School	$ 24,570.37
Pa. 1144	High School—No. Fayette, Pa. School	$ 6,544.37
Pa. 1189	School Bldg.—Chalfonte, Pa. School	$ 6,136.37
Pa. 1109	School Port Vue, Pa.	$ 6,540.00
Pa. 1458	Edwin Markham School School, Mt. Lebanon, Pa.	$ 2,659.12
Pa. 1310	Senior High School School, Verona, Pa.	$ 7,335.25
Pa. 1332	Vocational School School, Clairton, Pa.	$ 4,294.62
Pa. 1130	Westinghouse Memorial H. S. School, Wilmerding, Pa.	$ 25,772.75
Pa. 7000 Cont. 4-C	Municipal Airport Airport Electrical Facilities	$ 8,964.30
Pa. 1173-RS	Prospect Jr. High School School	$ 19,372.50
Pa. 1546	School, Library, Pa. Snowden Twp.—School	$ 2,965.87
Pa. 1069	School Additionals Hampton Twp.	$ 4,218.62
Pa. 1575	Filtration Plant Braddock, Pa.	$ 12,366.25
Pa. 1940-F	Greenwood School School, Versailles Twp.	$ 4,803.75
Pa. 2209-F	Municipal Building Wilkinsburg, Pa.	$ 16,255.25

Official Designation	Description of Project	Damages sustained by the Government of the United States
Pa. 2142-F	Lincoln & Washington School Adds.—Bridgeville, Pa.	$ 4,106.25
Pa. 1600-F Cont. 27	Armstrong Playground Field House	$ 604.50
Pa. 1600-F Cont. 25	Frazier Playground Field House	$ 5,149.80
Pa. 1600-F Cont. 29	Sophia Evert Playground Field House	$ 399.60
Pa. 1600-F Cont. 31	Highland Park Comfort Sta.	$ 252.45
Pa. 1600-F Cont. 33	Garfield Playground Field House	$ 516.60
Pa. 1649-F Cont. 4	Highland Park Zoo Zoo	$ 690.75
Pa. 2208-F Cont. 6	Filter House	$ 2,602.90
Pa. 2208-F Cont. 14	Filter House	$ 1,136.25
Pa. 2208-F Cont. 12	Filter House	$ 1,750.50
Pa. 2208-F Cont. 9	Filter House	$ 1,692.90
Pa. 1612-F Cont. 11	Dunbar Playground Field House	$ 964.80
	Total Damages Sustained by the Government of the United States	$744,954.33

WHEREFORE, the plaintiffs demand judgment against the said Defendants in the sum of One Million Four Hundred Eighty-nine Thousand, Nine Hundred Eight Dollars and Sixty-six Cents ($1,489,908.66) being double the amount of the damages sustained by the United States as above set forth, or such sum that the Court may

find, together with interest thereon in such c[illegible]nade and provided; and

That the Court enter judgments against the defendants and each of them for the sum of Two Thousand Dollars ($2,000.00) for each of the violations hereinbefore set forth as aforesaid in such cases made and provided.

That the Court enter judgment against the defendants for the cost of this suit.

Plaintiffs demand a jury trial.

(Signed) CHARLES J. MARGIOTTI,
" S. C. PUGLIESE,
" MARGIOTTI, EVANS & PUGLIESE,
" JOSEPH H. REICH,
Attorneys for Plaintiffs.

MARGIOTTI, EVANS & PUGLIESE
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and
JOSEPH H. REICH
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EXHIBIT "A"

Name	Official Designation	Character	Location	Amount of U. S. Funds Allocated	Awarding Authority, Sponsor, Owner
McGee Playground	Pa. 1633-F Cont. 4	Bath and Field House	Pgh., Pa.	$ 84,352.00	City of Pgh. Pgh. Ally. Co., Pa.
Cowley-Goettman Playground	Pa. 1633-F Cont. 9	Swimming Pools	Pgh., Pa.	$ 84,352.00	City of Pgh. Pgh. Ally. Co., Pa.
Burgwin Playground	Pa. 1634-F Cont. 4	Swimming Pool	Pgh., Pa.	$282,105.00	City of Pgh. Pgh. Ally. Co., Pa.
Goncord Elementary School	Pa. 1687-F	School	Pgh., Pa.	$183,656.00	School Dist. of City of Pgh. Pgh. Ally. Co., Pa.
Schiller Elementary School	Pa. 1688-F	School	Pgh., Pa.	$240,850.00	School Dist. of City of Pgh. Pgh. Ally. Co., Pa.
Whittier Elementary School	Pa. 1689-F	School	Pgh., Pa.	$225,312.00	" " "
Blawnox Municipal Bldg.	Pa. 1695-F	Municipal Building	Boro. of Blawnox, Pa.	$ 17,550.00	The Boro. of Blawnox, Blaw. Ally. Co., Pa.

Name	Official Designation	Character	Location	Amount of U. S. Funds Allocated	Awarding Authority, Sponsor, Owner
South Vocational High School	Pa. 1907-F	School	Pgh., Pa.	$ 33,851.00	School Dist. of City of Pgh. Pgh. Ally. Co., Pa.
Miller Ele. School	Pa. 1908-F	School	Pgh., Pa.	$101,541.00	School Dist. "
West View High School	Pa. 1920-F	High School	West View, Pa.	$162,405.00	School Dist. of the Boro of West View, Ally. Co.,Pa.
Schenley Park	Pa. 1600-F Cont. 3	Comfort Sta.	Pgh., Pa.	$ 82,965.00	City of Pgh. Pgh. Ally. Co., Pa.
McKinley Park	Pa. 1600-F Cont. 7	Field House No. 2	Pgh., Pa.	$ 82,965.00	City of Pgh. Pgh. Ally. Co., Pa.
Sophia Evert Playground	Pa. 1600-F Cont. 14	Field House	Pgh., Pa.	$ 82,965.00	City of Pgh. Pgh. Ally. Co., Pa.
Townsend Playground	Pa. 1600-F Cont. 35	Field House	Pgh., Pa.	$ 82,965.00	City of Pgh. Pgh. Ally. Co., Pa.
Larimer Playground	Pa. 1600-F Cont. 37	Field House	Pgh., Pa.	$ 82,965.00	City of Pgh. Pgh. Ally. Co., Pa.
Sophia Evert Playground No. 2	Pa. 1612-F Cont. 4	Field House	Pgh., Pa.	$ 85,732.00	City of Pgh. Pgh. Ally. Co., Pa.

Name	Official Designation	Character	Location	Amount of U. S. Funds Allocated	Awarding Authority, Sponsor, Owner
Arsenal Elementary School	Pa. 1617-F	School	Pgh., Pa.	$228,730.00	School Dist. of City of Pgh. Pgh. Ally. Co., Pa.
Crescent Elementary School	Pa. 1618-F	School	Pgh., Pa.	$224,737.00	School Dist. of City of Pgh. Pgh. Ally. Co., Pa.
East End Elem. School	Pa. 1935-F	School	McKeesport, Pa.	$ 94,950.00	School Dist. of the City of McKeesport, McKeesport, Ally. Co., Pa.
Homerville Jr. High School	Pa. 1975-F	School	Mifflin Twp., Pa.	$358,200.00	School Dist. of Twp. of Mifflin Terrace, Mifflin Twp., Ally. Co., Pa.
Siebert School	Pa. 1977-F	School	Ross Twp., Pa.	$ 35,248.00	School Dist. of Twp. of Ross, Bellevue, Ally. Co., Pa.
West Penn Playground	Pa. 1987-F Cont. 6	Recreation Bldgs.	Pgh., Pa.	$202,320.00	City of Pgh., Pgh., Ally. Co., Pa.

Name	Official Designation	Character	Location	Amount of U. S. Funds Allocated	Awarding Authority, Sponsor, Owner
Spring Garden Elementary School	Pa. 2016-F	School	Pgh., Pa.	$139,106.00	School Dist. of City of Pgh., Pgh. Ally. Co. Pa.
West Liberty Elementary Sch.	Pa. 2017-F	School	Pgh., Pa.	$ 94,841.00	School Dist. of City of Pgh., Pgh. Ally. Co. Pa.
Thaddeus Stevens Elementary Sch.	Pa. 2018-F	School	Pgh., Pa.	$276,489.00	School Dist. City of Pgh., Pgh., Ally. Co. Pa.
Girls Vocational School	Pa. 2019-F	High School	Pgh., Pa.	$ 45,080.00	School Dist. City of Pgh., Pgh., Ally. Co. Pa.
East Ohio St. Grade Crossing	Pa. 2023-F	Grade Crossing	Millvale Boro. Ally. County	$ 76,050.00	Co. of Ally. Pgh. Ally. Co. Pa.
Leech Farm	Pa. 2154-F	Tuberculosis Sanitarium	Pgh., Pa.	$286,285.00	City of Pgh., Ally. Co. Pa.
Shaler Twp. Softening Plant	Pa. 2224-F	Softening Plant and Pumping Sta.	Shaler Twp. Ally., Penna.	$ 68,783.00	The Twp. of Shaler, Glenshaw, Ally. Co. Pa.

Name	Official Designation	Character	Location	Amount of U. S. Funds Allocated	Awarding Authority, Sponsor, Owner
Braddock Jr. High School	Pa. 1692-DS	Jr. High School	Braddock, Pa. .	$301,367.00	School Dist. of the Boro. of Braddock Brdk., Ally. Co. Pa.
Crafton Municipal Building	Pa. 1703-DS	Municipal Bldg.	Crafton, Pa.	$ 31,500.00	Boro of Crafton, Crafton, Pa.
Mifflin Twp. Steam Heating Plant	Pa. 7000	Steam Heating Plant	Mifflin Twp. Ally. Co., Pa.	$576,837.00	County of Ally., Pgh., Pa.
North Park Bath House	Pa. 7000 Cont. 3	Bathhouse	Ally. Co., Pa.	$576,837.00	The County of Ally., Pgh., Pa.
Municipal Airport	Pa. 7000-R Contract 4-A	Airport Electrical Facilities	Ally Co., Pa.	$576,837.00	The County of Ally., Pgh., Pa.
Municipal Airport	Pa. 7000-R Contract 4-B	Airport Electrical Facilities	Ally Co., Pa.	$576,837.00	The Co. of Ally. Pgh., Pa.
Municipal Airport	Pa. 7000-R Cont. 4-D	Airport Electrical Facilities	Ally Co., Pa.	$576,837.00	The Co. of Ally. Pgh., Pa.

Name	Official Designation	Character	Location	Amount of U. S. Funds Allocated	Awarding Authority, Sponsor, Owner
Municipal Airport	Pa. 7000-R Cont. 4-E	Airport Electrical Facilities	Ally. Co. Pa.	$576,837.00	The County of Ally. Pgh. Pa.
Municipal Airport	Pa. 7000-R Cont. 4-F	Airport Electrical Facilities	Ally. Co. Pa.	$576,837.00	The Co. of Ally. Pgh. Pa.
North Park Boat House	Pa. 9616	Boat House	McCandless Twp. Ally. Co. Pa.	$492,750.00	Co. of Ally. Pgh. Pa.
Western State Pen.	Pa. 1845-D	Penitentiary	Pgh. Pa.	$185,836.00	The Genl. State Authority, Hsbg. Pa.
Highland Park Zoo	Pa. 1640-F Cont. 7	Cat Room	Pgh. Pa.	$114,288.00	City of Pgh., Pgh. Ally. Co. Pa.
Lincoln Sch. Bldg.	Pa. 1456	School Add.	Mt. Lebanon	$ 13,909.00	School Dist. of the Twp. of Mt. Lebanon, Pgh. Ally. Co. Pa.

Name	Official Designation	Character	Location	Amount of U. S. Funds Allocated	Awarding Authority, Sponsor, Owner
Homestead High Level Bridge	Pa. 2976 Cont. 206	Bridge	Pgh. Pa.	Loan— $990,000.00 Grant— $1,836,000	Allegheny County Authority, a Penna. Corp.
Jerome St. Bridge	Pa. 2976 Cont. 305	Bridge	Pgh. Pa.	Loan— $990,000.00 Grant— $1,836,000.00	Ally. Co. Authority, a Penna. Corp.
County Home	Pa. 4242	County Home	Woodville Collier Twp. Ally. Co. Pa.	$713,000.00	Ally. Co. Home Woodville Ally. Co. Pa.
Baldwin Twp. High School	Pa. 1924-F	High School	Baldwin Twp. Ally. Co. Pa.	$192,735.00	School Dist. of Twp. of Baldwin, Baldwin Twp. Ally. Co. Pa.
North Side Market	Pa. 7897	Market	Pgh. Pa.	$ 71,000.00	City of Pgh. Pgh. Ally. Co. Pa.

Name	Official Designation	Character	Location	Amount of U. S. Funds Allocated	Awarding Authority, Sponsor, Owner
Juvenile Court	Pa. 7501	Court and Detention Home	Pgh. Pa.	$ 98,000.00	County of Ally. Pa.
Perry High School	Pa. 1299	High School and Athletic Field	Pgh. Pa.	$ 19,935.00	School Dist. of City of Pgh., Pgh. Ally. Co. Pa.
Spring Hill Elementary School	Pa. 1156	School	Pgh. Pa.	$ 24,083.00	School Dist. of The City of Pgh., Pgh. Ally. Co. Pa.
Carmalt Elem. School	Pa. 1150	School	Pgh. Pa.	$ 66,012.00	School Dist. of the City of Pgh. Ally. Co. Pa.
Kenmar School	Pa. 1392	School	Kennedy Twp.	$ 18,502.00	School Dist. of the Twp. of Kennedy, Ally. Co. Pa.
Banksville Elem. School	Pa. 1317	School	Pgh. Pa.	$ 73,947.00	School Dist. of the City of Pgh., Pgh. Ally. Co. Pa.

Name	Official Designation	Character	Location	Amount of U. S. Funds Allocated	Awarding Authority, Sponsor, Owner
Washington Trade School	Pa. 1303	School	Pgh. Pa.	$211,689.00	The School Dist. of Pgh., Pgh. Ally. Co. Pa.
Burgwin Elem. School	Pa. 1302	School	Pgh. Pa.	$196,563.00	School Dist. of City of Pgh., Pgh. Ally. Co. Pa.
High School	Pa. 1144	School	No. Fayette Pa.	$ 52,363.00	School Dist. of Twp. of North Fayette, Ally. Co. Pa.
School Bldg.	Pa. 1189	School	Chalfonte, Pa.	$ 49,091.00	School Board of Chalfonte Boro. Ally. Co. Pa.
School	Pa. 1109	School	Port Vue, Pa.	$ 49,091.00	School Dist. of Boro. of Port Vue, Ally. Co. Pa.
Edwin Markham School	Pa. 1458	School	Mt. Lebanon, Pa.	$ 21,273.00	School Dist of the Twp. of Mt. Lebanon, Mt. Leb. Twp. Ally. Co. Pa.

Name	Official Designation	Character	Location	Amount of U. S. Funds Allocated	Awarding Authority, Sponsor, Owner
Senior High	Pa. 1310	School	Verona, Pa.	$ 58,682.00	School Dist.of Boro of Verona, Verona, Ally. Co. Pa.
Vocational School	Pa. 1332	School	Clairton, Pa.	$ 34,357.00	School Dist. of the City of Clairton, Ally. Co. Pa.
Westinghouse Memorial High School	Pa. 1130	School	Wilmerding, Pa.	$206,182.00	School Dist. of the Boro. of Wilmerding, Wilmerding, Ally. Co. Pa.
Municipal Airport	Pa. 7000 Cont. 4-C	Airport Electrical Facilities	Mifflin Twp. Ally. Co. Pa.	$576,837.00	County of Ally. Pgh. Pa.
Prospect Jr. High School	Pa. 1173 RS	School	Pgh., Pa.	$154,980.00	School Dist. of the City of Pgh. Pgh. Ally. Co. Pa.

Name	Official Designation	Character	Location	Amount of U. S. Funds Allocated	Awarding Authority, Sponsor, Owner
School	Pa. 1546	School	Library, Pa. Snowden Twp.	$ 23,727.00	School Dist. of Snowden Twp. Ally. Co. Pa.
School Additionals	Pa. 1069	School	Hampton Twp. Ally. Co. Pa.	$ 33,750.00	School Dist. of Twp. of Hampton Ally. Co. Pa.
Filtration Plant	Pa. 1575	Filtration Plant	Braddock, Pa.	$ 98,931.00	Boro of Braddock Braddock, Ally. Co. Pa.
Greenwood School	Pa. 1940-F	School	Versailles Twp. Pa.	$ 38,430.00	School Dist. of Twp. of Versailles Ally. Co. Pa.
Municipal Building	Pa. 2209-F	Municipal Bldg.	Wilkins-burg, Pa.	$130,041.00	Boro. of Wilkins-burg, Ally. Co. Pa.
Lincoln & Washington School Adds.	Pa. 2142-F	School Additions	Bridge-ville, Pa.	$ 32,850.00	School Dist. of Boro of Bridge-ville, Bridge. Ally. Co. Pa.
Armstrong Playground	Pa. 1600-F Cont. 27	Field House	Pgh., Pa.	$ 82,965.00	City of Pgh. Pgh. Ally. Co. Pa.

Name	Official Designation	Character	Location	Amount of U. S. Funds Allocated	Awarding Authority, Sponsor, Owner
Frazier Playground	Pa. 1600-F Cont. 25	Field House	Pgh., Pa.	$ 82,965.00	City of Pgh. Pgh. Ally. Co. Pa.
Municipal Hosp. Bldg.	Pa. 2218-F	Hospital Building	Pgh., Pa.	$900,000.00	City of Pgh. Pgh. Ally. Co. Pa.
Sophia Evert Playground	Pa. 1600-F Cont. 29	Field House	Pgh., Pa.	$ 82,965.00	City of Pgh. Pgh. Ally. Co. Pa.
Highland Park	Pa. 1600-F Cont. 31	Comfort Sta.	Pgh., Pa.	$ 82,965.00	City of Pgh. Pgh. Ally. Co. Pa.
Garfield Playground	Pa. 1600-F Cont. 33	Field House	Pgh., Pa.	$ 82,965.00	City of Pgh. Pgh. Ally. Co. Pa.
Highland Park Zoo	Pa. 1649-F Cont. 4	Zoo	Pgh., Pa.	$114,248.00	City of Pgh. Pgh. Ally. Co. Pa.
Filter House	Pa. 2208-F Cont. 6	Filter Hse.	Pgh., Pa.	$124,700.00	City of Pgh. Ally. Co. Pa.
Filter House	Pa. 2208-F Cont. 14	Filter Hse.	Pgh., Pa.	$124,700.00	City of Pgh. Ally. Co. Pa.
Filter House	Pa. 2208-F Cont. 12	Filter Hse.	Pgh., Pa.	$124,700.00	City of Pgh. Ally. Co. Pa.
Filter House	Pa. 2208-F Cont. 9	Filter Hse.	Pgh., Pa.	$124,700.00	City of Pgh. Ally. Co. Pa.
Dunbar Playground	Pa. 1612-F Cont. 11	Field Hse.	Pgh., Pa.	$ 85,732.00	City of Pgh. Pgh. Ally. Co. Pa.

Answer of C. W. Ridinger, Sr., and Jr., Warren I. Bickford and Iron City Engineering Co.

The defendants, C. W. Ridinger, Sr., C. W. Ridinger, Jr., Warren I. Bickford and Iron City Engineering Co., admit the allegations of fact contained in the paragraphs numbered 2, 4 and 7 of the complaint; admit the allegations of fact contained in paragraph 3, except that the Iron City Engineering Co. is incorporated under the laws of New Jersey, not Pennsylvania, and except that the principal place of business of the Industrial Electric Co. is in Beaver County, not Allegheny County, Pennsylvania, and that of the Lord Electric Company is in the City and State of New York, not Allegheny County, Pennsylvania; admit the allegations of fact contained in paragraph 5, except as to the defendant Edwin C. Carter, who at all times material to this case was in the military forces of the United States; admit the allegations of fact contained in paragraph 9, with the qualification that the advertisements for bids were general and no bids were called for from the defendants specially or personally; and deny each and every other allegation contained in the complaint.

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WILLIAM H. ECKERT
SMITH, BUCHANAN & INGERSOLL
Attorneys for C. W. Ridinger, Sr., and Jr., Warren I. Bickford and Iron City Engineering Co.

1025 Union Trust Bldg.,
Pittsburgh, Pa.

(A similiar answer was filed by each other defendant).

Amendment to Answer of All Defendants.

Each and all of the defendants in the above-entitled case hereby amends his, its or their respective answer by adding thereto the following:

SECOND DEFENSE

At No. 10462 Criminal in this Court the defendants have each and all been indicted, pleaded nolo contendere, been duly sentenced and have paid the fines imposed upon them, respectively, by this Court, for the same alleged acts which are made the basis of the present suit. The present suit, is, therefore, barred by said former punishment for the same alleged offenses.

WILLIAM H. ECKERT
EUGENE B. STRASSBURGER
J. V. BURKE, JR.
Of Counsel for all Defednants.

1025 Uhion Trust Building,
Pittsburgh, Pennsylvania.

Plaintiffs' Reply to the Second Defense of Defendants' Amended Answer.

The plaintiffs deny that at No. 10462 Criminal in this Court, the defendants have each and all been indicted, pleaded nolo contendere, been duly sentenced and have paid the fines imposed upon them, respectively, by this Court, for the same alleged acts which are made the basis of the present suit. And the plaintiffs specifically deny that the present suit is, therefore, barred by said former punishment for the same alleged offenses.

MARGIOTTI, EVANS & PUGLIESE
CHAS. J. MARGIOTTI
JOSEPH H. REICH
JOSEPH A. ROSSI
Attorneys for Plaintiffs

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Pittsburgh, Penna.

Second Amendment to Answer of All Defendants.

Each and all of the defendants in the above entitled case hereby amends his, its or their respective answer by changing the second defense to read as follows:

SECOND DEFENSE

At No. 10462 Criminal in this Court the defendants have each and all been indicted, pleaded nolo contendere, been duly sentenced and have paid the fines imposed upon them, respectively, by this Court, at No. 10463 Criminal the defendants Franklin Electric Construction Co. and Thomas G. Hodgdon, at No. 10464 Criminal the defendants Franklin Electric Construction Co. and Thomas G. Hodgdon, Jr., at No. 10465 Criminal the defendants MacNeil Electric Co. and Robert B. Yates, at No. 10466 Criminal the defendants MacNeil Electric Co.

and Alvin S. MacNeil, at No. 10467 Criminal the defendant K. K. Wood, at No. 10468 Criminal the defendant Walter F. Weberg, at No. 10469 Criminal the defendant J. H. Stauffer, at No. 10470 Criminal the defendant R. W. Schindler, at No. 10471 Criminal the defendant Edward B. Sargent, at No. 10472 Criminal the defendant D. R. Ross, at No. 10473 Criminal the defendant Bernard A. Ross, at No. 10474 Criminal the defendant J. A. Rodden, at No. 10475 Criminal the defendants Israel Raphael and Benjamin Raphael, at No. 10476 Criminal the defendant Robert N. Morris, at No. 10477 Criminal the defendants Morganstern Electric Co. and R. M. Morganstern, at No. 10478 Criminal the defendant W. S. Martin, at No. 10479 Criminal the defendants Lord Electric Co. and J. R. Williams, at No. 10480 Criminal the defendant I. J. Levinson, at No. 10481 Criminal the defendant Norman B. Leeke, at No. 10482 Criminal the defendants Industrial Electric Co. and H. L. Fullerton, at No. 10483 Criminal the defendants Hess and Barton, Inc., H. C. Barton and William F. Hess, at No. 10484 Criminal the defendant William Charles Hemmerle, at No. 10485 Criminal the defendant H. D. Hale, at No. 10486 Criminal the defendants Star Electric and Construction Co. and W. C. Gloekler, at No. 10487 Criminal the defendant R. G. Diodati, at No. 10488 Criminal the defendants Daniels Electric Construction Co. and M. Daniels, at No. 10489 Criminal the defendant J. C. Devlin, doing business as Devlin Electric Construction Co., at No. 10490 Criminal the defendant C. M. Cronenweth, at No. 10491 Criminal the defendants G. L. Craig Electric Co., William Taczanowsky and G. L. Craig at No. 10492 Criminal the defendants C. L. Craig Electric Co. and William Taczanowsky, at No. 10493 Criminal the defendants G. L. Craig Electric Co. and G. L. Craig, at No. 10494 Criminal the defendants Craig Electric Co. and J. V. Burke, at No. 10495 Criminal the defendant Louis H. Berkman, at No. 10496 Criminal the defendant J. E. Hale, at No. 10497

Criminal the defendant John W. Craig, and at No. 10498 Criminal the defendants Carter Electric Co. and Edwin C. Carter were each indicted for making false certificates in connection with the conspiracy charged in the indictment at No. 10462 Criminal. It was agreed between the United States of America and the defendants above named that the fines imposed and paid at No. 10462 Criminal should be deemed as punishment for the offenses charged in all of the aforesaid indictments, and said fines were accepted by the United States of America in compromise and full satisfaction of all of said indictments and of all of the criminal liability of the defendants for the alleged conspiracy in bidding and for the making of any false certificates by them regarding such bidding. The alleged acts and offenses involved in said prior criminal proceedings are the same as those which are made the basis of the present suit. The present suit is, therefore, barred by said former punishment for the same alleged offenses.

WILLIAM H. ECKERT
EUGENE B. STRASSBURGER
J. VINCENT BURKE, JR.
Of Counsel for all Defendants

1025 Union Trust Building
Pittsburgh, Pennsylvania.

Plaintiffs' Reply to the Second Amendment to Answer of All Defendants.

The plaintiffs admit the averments set forth in the second defense as stated that at No. 10462 Criminal in this Court the defendants have each and all been indicted, pleaded nolo contendere, been duly sentenced and have paid the fines imposed upon them, respectively, by this Court. Said sentence and fine related only to said indictment at No. 10462 Criminal. The plaintiffs admit that at No. 10463 Criminal the defendants Franklin Electric Construction Co. and Thomas G. Hodgdon, at 10464 Criminal the defendants Franklin Electric Construction Co. and Thomas G. Hodgdon, Jr., at No. 10465 Criminal the defendants MacNeil Electric Co. and Robert B. Yates, at No. 10466 Criminal the defendants MacNeil Electric Co. and Alvin S. MacNeil, at No. 10467 Criminal the defendant K. K. Wood, at No. 10468 Criminal the defendant Walter F. Weberg, at No. 10469 Criminal the defendant J. H. Stauffer, at No. 10470 Criminal the defendant R. W. Schindler, at No. 10471 Criminal the defendant Edward B. Sargent, at No. 10472 Criminal the defendant D. R. Ross, at No. 10473 Criminal the defendant Bernard A. Ross, at No. 10474 Criminal the defendant J. A. Rodden, at No. 10475 Criminal the defendants Israel Raphael and Benjamin Raphael, at No. 10476 Criminal the defendant Robert N. Morris, at No. 10477 Criminal the defendants Morganstern Electric Co. and R. M. Morganstern, at No. 10478 Criminal the defendant W. S. Martin, at No. 10479 Criminal the defendants Lord Electric Co. and J. R. Williams, at No. 10480 Criminal the defendant I. J. Levinson, at No. 10481 Criminal the defendant Norman B. Leeke, at No. 10482 Criminal the defendants Industrial Electric Co. and H. L. Fullerton, at No. 10483 Criminal the defendants Hess and Barton, Inc., H. C. Barton and William F. Hess, at No. 10484 Criminal the defendant William Charles Hem-

merle, at No. 10485 Criminal the defendant H. D. Hale, at No. 10486 Criminal the defendants Star Electric and Construction Co. and W. C. Gloekler, at No. 10487 Criminal the defendant R. G. Diodati, at No. 10488 Criminal the defendants Daniels Electric Construction Co. and M. Daniels, at No. 10489 Criminal the defendant J. C. Devlin, doing business as Devlin Electric Construction Co., at No. 10490 Criminal the defendant C. M. Cronenweth, at No. 10491 Criminal the defendants G. L. Craig Electric Co., William Taczanowsky and G. L. Craig, at No. 10492 Criminal the defendants G. L. Craig Electric Co. and William Taczanowsky, at No. 10493 Criminal the defendants G. L. Craig Electric Co. and G. L. Craig, at No. 10494 Criminal the defendants Craig Electric Co. and J. V. Burke, at No. 10495 Criminal the defendant Louis H. Berkman, at No. 10496 Criminal the defendant J. E. Hale, at No. 10497 Criminal the defendant John W. Craig and at No. 10498 Criminal the defendants Carter Electric Co. and Edwin C. Carter were each indicted for making false certificates. However, a nolle prosequi was entered upon motion and order on indictments Nos. 10463 to 10498 inclusive. Plaintiffs deny that indictments Nos. 10463 to 10498 inclusive were in connection with the conspiracy charged in the indictment at No. 10462 Criminal. The plaintiffs further deny that it was agreed between the United States of America and the defendants above named that the fines imposed and paid at No. 10462 Criminal should be deemed as punishment for the offenses charged in all of the aforesaid indictments, and specifically deny that the said fines were accepted by the United States of America in compromise and full satisfaction of all of said indictments and of all of the criminal liability of the defendants for the alleged conspiracy in bidding and for the making of any false certificates by them regarding such bidding. The plaintiffs further deny specifically that the alleged acts and offenses involved in said prior criminal proceedings

are the same as those which are made the basis of the present suit. Wherefore, the plaintiffs specifically deny that the present suit is, therefore, barred by said former punishment for the same alleged offenses.

CHAS. J. MARGIOTTI,
JOSEPH ROSSI,
JOSEPH REICH,
S. C. PUGLIESE,
MARGIOTTI, EVANS & PUGLIESE,
Attorneys for Plaintiffs.

Transcript of Portions of Trial.

JOHN F. LABOON, a witness produced on behalf of plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Margiotti:

* * * * * * *

[8]* Q. Do you have any knowledge yourself as to the method of payment of the contract?

A. Yes, sir.

Q. What was that method?

A. We provided in our contracts—and we always do, as a matter of fact—for payment on the basis of monthly estimates—

Mr. Eckert:

Q. You are talking about the County's payments?

A. That is right. Under our arrangement, our resident engineer estimates the amount of work which the contractor has completed during the current period, whether that is a month or two weeks—it is usually a month, and so stipulated, the time is stipulated. In the

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* Numbers in brackets refer to pages of copy of trial proceedings in record on appeal.

case of PWA contracts, such as this one here under discussion, the Homestead High Level Bridge, the estimate of our resident engineer was submitted to the local official representing the PWA, who then approved it and it was placed in order for payment.

Q. What is PWA?

A. That is Public Works Administration.

Q. Of what?

A. That is the official designation—of United States of America, I suppose.

[9] Q. Do you know whether in the case of the Homestead High Level Bridge the job was paid for in full?

A. Yes, I can tell you that. It was not paid in full. You mean—

Q. The contractor, the electrical contractor.

A. Oh, we paid the contractor in full, that is correct.

Q. You have stated that PWA approved your estimates before payments were made to the contractors. Is that right?

A. That is correct.

Q. In that connection, were the contractors required to submit any information to you on making the estimates, or any bills or statements?

A. Not necessarily. They were required to submit a payroll—in fact, that is a requirement in all County contracts now; we require the contractor to submit a detailed payroll; and we have in our contracts, of course, a minimum wage clause. We usually made the estimate ourselves, we felt we were capable enough to do that work; but if the contractor did not agree, he had a right to, of course, protest; and if he could convince us that our estimate was entirely too low, we might bring it up to a point where we thought it was a fair estimate, but we tried to make a fair estimate.

. . . . . .

CROSS EXAMINATION.

Mr. Strassburger:

* * * * * * *

[21] Q. Now, this weekly payroll that was submitted to your office by the contractors in each of these cases was submitted so that you could ascertain whether or not they were maintaining the wage scale. Is that correct?

A. That was the prime purpose of it.

* * * * * * *

Mr. Eckert:

[22] Q. When you talked about a contract being entered into for the Homestead High Level Bridge, that contract was between the County of Allegheny on the one hand and the Rodden Electric Company on the other hand. Is that right?

A. Strictly speaking, that was between the Allegheny County Authority and the Rodden Electric Company. There is a little distinction there. I believe that contract was entered into before the Allegheny County Authority was dissolved and absorbed by the County of Allegheny.

Q. But in each of these cases that you have referred to, the contract was either between the County or the Allegheny County Authority on the one hand and the electrical contractor on the other hand?

A. That is true.

Q. The United States Government was no party to those contracts?

Mr. Margiotti: That is objected to, because the contract speaks for itself, and that is a conclusion.

The Court: Yes, that is a conclusion. The contracts themselves will show who were the parties to them, if they are produced. Are they going to be produced?

Mr. Eckert: Of course, that is what we have asked from the beginning.

The Court: If they are not going to be produced, I will let you pursue this cross examination now.

Mr. Eckert: We think by all means the contracts should be produced, that they are the best evidence of their terms. But Mr. Margiotti has asked Mr. Laboon some general questions, and I want to bring out that those contracts are wholly between the County on the one hand, or whatever the authority might be, like the Allegheny County Authority or some other municipality, and the electrical contractor. They were bi-party contracts, not tri-party contracts.

Mr. Margiotti: That is correct.

The Court: Is the question objected to?

Mr. Margiotti: Yes, it is.

The Court: If the question is objected to, we will sustain the objection; but, however, say that this witness may be recalled for further cross examination in case the contracts themselves are not produced.

Mr. Eckert: That is satisfactory to us.

[23] Q. You refer to a contract between the County and the Federal Government. That contract was entered into before the County even advertised for bids from contractors. Isn't that right?

A. That is true.

Q. And, of course, therefore, the contract between the County and the Federal Government was entered into before any contract was entered into between the County and the electrical contractors?

A. That is correct.

Q. And the contract between the County and the Federal Government was also entered into before the contractors ever submitted any bids to the County?

A. That is correct.

Q. When you said that the contractors had been paid in full the amount called for by their contracts on these several jobs about which you have testified, by whom were they paid?

A. The County of Allegheny.

Q. By the County of Allegheny?

A. That is right.

Q. You referred to Ingham & Boyd as the architects for the Juvenile Court building. By whom were they hired?

A. They were hired by the previous Board of County Commissioners.

Q. But by the County of Allegheny?

A. That is right; by the County of Allegheny.

* * * * * * *

RE-CROSS EXAMINATION.

[27] *Mr. Eckert*:

Q. Director, in your redirect examination you have testified that the contractors on some other jobs, like the Jerome Street job, have been paid in full. There again you mean that the contractor was paid in full by the County of Allegheny. Is that right?

A. That is right, yes, sir.

Q. And when you testified before that after you had made your monthly estimates of the work done, and that had been checked by the PWA inspector on the job, that you then put the requisition through for payment. You mean payment by the County; is that right?

A. That is right.

* * * * * * *

Mr. Margiotti:

[28] A. I have the plans and specifications for the Juvenile Court Building, that the architect sent over.

Q. Do you know them to be the plans and specifications?

A. No, sir, I wouldn't be able to tell, because, as I say, the architect alone had complete detail supervision of this job, and we were merely in the picture to see that—when the building was finished I made the final inspection to see all details were completed; but I would not be able to tell you whether these were the plans or not.

Q. Well, let us have them anyhow, and we will mark them.

* * * * * * *

M. M. STEEN, a witness produced on behalf of plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Margiotti:

* * * * * * *

[43] Q. So that in this Plaintiff's Exhibit 25 we have "Portion of Government Grant for Electrical Work"; that is the total amount of forty-five per cent paid by the Government, and you paid fifty-five per cent?

A. We paid fifty-five per cent.

[44] *Mr. Strassburger*: That is objected to, as not a proper statement of what occurred here as we developed in yesterday's testimony. The School Board paid it all, and there was a grant made to the School Board. That is not a fair question, Your Honor.

Mr. Margiotti: The School Board did the paying, but it got the money from the Government.

The Court: As I would interpret the cross examination and the answers of the witness, it had reference to the disposition of the Government funds received by the School Board.

Mr. Margiotti: That is what I had in mind.

The Court: And, as I look at it, it doesn't change the testimony that the funds paid to the contractors were in fact paid by the School Board. The

grant of the Government was to the School District and not to anyone else.

Mr. Margiotti: For that purpose.

The Court: Yes, for the purpose of this work.

Mr. Strassburger: I know, but the way the question was asked the inference might be drawn that the contractors got something from the Government, and they did not.

Mr. Eckert: That is a conclusion to be drawn by Your Honor, and not for Mr. Margiotti to put in via the witness. We object to the question and move to strike out the answer, on the ground the question is incompetent, irrelevant and immaterial, asking for a conclusion which is for the Court to draw, and bad in form, leading also—this is direct examination.

The Court: It is a summation in a way of what is shown on the paper itself, and there is no testimony from this witness really needed for that. We have the specific facts, and that is all that is legally proper to bring out on the witness stand. It looks to me merely like an explanation of what is shown upon Exhibit 25. I do not see how any conclusion can be drawn from that, from what the witness has said in answer to the question propounded by Mr. Margiotti, that the money was paid to the electrical contractor by the Government, when as a matter of fact under all the evidence the grant was made to the School Board, who contracted with the contractors and raised that much money from the Government to apply on the contract. That is all I see in it.

Mr. Margiotti: That is correct.

* * * * * * *

[54] *Mr. Margiotti*:

Q. I now refer to Exhibits 25 and 26. You stated for Mr. Strassburger that you would be able to tell what

was the cause of the withholding of a portion of the grant on seven of the electrical contracts; and I will now begin with the Arsenal School, in which you show grant due $2500. Have you some explanation on that from your records?

A. Yes; that is project 1617-F, I believe?

Q. That is right.

A. The explanation of the differences between the amount of the grant requisitioned and the amount paid, as received from the Federal Government, Federal Works Agency, has this note: "The amount of $2500 withheld from this payment is a temporary suspension pending receipt of advice as to what action the owner decides to take against the electrical contractor in relation to bid irregularities." And that is the reason given for the withholding of that $2500.

Q. Very well. That comes directly from the PWA?

A. Yes, that comes directly from the PWA; it is under the signature of J. J. Madigan, Executive Officer.

Q. Now, take Concord, Pa. 1687-F, grant due $1500.

A. This has this note attached to the same type of paper: "The amount of $1500 is withheld pending further action by the City with regard to the collusive bidding on the electrical contract."

Q. By the City?

A. I read it just as it is stated here.

* * * * * * *

[55] *Mr. Margiotti*:

Q. The Schiller School, Pennsylvania 1688-F, and the amount mentioned here is $2,000.

A. This also carries the note on that same type of paper: "The amount [56] of $2,000 withheld from this payment is a temporary suspension pending receipt of advice from the owner as to what action the owner will

take against the electrical contractor due to bid irregularities."

* * * * * * *

CROSS EXAMINATION.

[65] *Mr. Eckert*:

Q. And those breakdowns were only for the purpose of estimating the total cost of the project. Isn't that right?

A. Yes, I think that is right.

Q. And then the Federal Government agreed to grant you forty-five per cent of that estimated total cost?

A. That is correct.

Q. And that is all the Federal Government agreed to do?

A. That is all they agreed to do, was to give forty-five per cent of the total cost as it was arrived at by those estimating methods.

* * * * * * *

[69] *Mr. Eckert*:

Q. Mr. Steen, you said that the contractors would turn in monthly estimates for payment on account?

A. That is right.

Q. Turned in to whom, did you mean—the School Board?

A. Yes, to the School Board.

Q. And then the School Board would get its engineer in charge of that job to approve that monthly estimate, and then the PWA inspector, and then you said those requisitions would come in for payment. Do you mean they would come back to the School Board at the Administration Building out in Oakland, and there the School Board would actually pay those monthly estimates? Is that right?

A. That is right, yes.

Q. The actual payment, then, was made to the contractors by the Board of Education of the City of Pittsburgh?

A. It was.

Q. And these affidavits known as Exhibits 47, 48, and 49 were sent in by the contractors to the School Board, together with tneir proposals. Is that right?

A. No, I don't think that is the way. I am sure that wasn't done that way. The contractor figured the job, put in his bid, and then we had the authority to have them sign non-collusion affidavits in this particular form if we so desired. We would bring the contractor in.

Q. By "we", you mean the School Board?

A. Yes, the School Board, the sponsor of the project. We would bring them in and have them sign these non-collusion affidavits.

Q. You mean the School Board would call the low bidder in and get him to sign?

A. Yes. In some cases we took other bidders, too. This applied not only for the principal contractors, but there was a non-collusion affidavit prepared for subcontractors as well that we had a number of them execute.

[70] Q. When you say "we", you always refer to the Board of Education of the City of Pittsburgh?

A. That is right. It was left entirely in our hands whether we would employ them or not.

Q. Those affidavits were given, then, to the Board of Education of the City of Pittsburgh?

A. They were.

Q. In these quotations which you read from communications from the Federal Works Agency this morning, explaining why funds had been withheld by the PWA on some of the grants, the term "Owner" is used in a phrase something like this: "Suspended from payment pending suit by the owner against the electrical contractor."

A. That is right.

Q. To whom does the term "Owner" refer?

A. The Board of Education.

Mr. Margiotti: That is objected to. Let that speak for itself. It is drawing a conclusion.

A. (Continued) That word "Owner" is defined in the documents.

Q. Just show us the document that defines the term "Owner".

A. Here is the term here, Mr. Eckert. Shall I read it?

Q. Yes.

A. "The term 'Owner' wherever used hereinafter shall be understood to embrace and include the Superintendent of Buildings of the Board, present incumbent C. L. Woodridge, who has with due authority approved and issued these said drawings and specifications by affixing his signature to said drawings and to said specifications on the last page thereof."

Q. What Board is it that is referred to there?

A. Here is the definition of "Board". "The Board of Public Education of the School District of Pittsburgh, Pa."

Q. You were reading from the contract documents relating to the Girls Vocational High School?

A. Yes, I was reading from the Girls Vocational High School at that time. I just picked one up at random.

Q. Is the term "Owner" referred to, Mr. Steen, generally, and in other places in connection with these projects, as referring to the local municipality which actually constructs the project and enters into the contract with the local contractors?

A. Well, I can speak for the Board of Education that that is so. The term "Owner" does apply in that way throughout these documents.

Q. To the Board of Education of the City of Pittsburgh?

A. Yes, it does.

* * * * * * *

RE-DIRECT EXAMINATION.

Mr. Margiotti:

[72] Q. Will you state whether or not these contracts were submitted to the PWA for approval?

* * * * * * *

A. They were approved by the PWA.

Q. How is that approval exhibited?

A. Well, they stamped the document and signed it by the Associate Director of the District.

Q. Will you please read the approval?

A. "Approved as to conformity with agreement between the applicant and the United States of America. G. Douglas Andrews, Associate Director Region No. 1."

* * * * * * *

Mr. Margiotti:

[74] Q. Was the affidavit that you have mentioned here submitted to the Government—the PWA?

A. You mean the ones we had here this morning?

Q. Yes, the ones you had here this morning, in connection with the contract.

A. I don't think they were submitted to the Government.

Q. Were they shown to anybody?

A. They were introduced. The Government requisition asked for them in their trial, but they weren't submitted to them prior to that.

Q. I mean at the time the contractor signed them.

Mr. Eckert:

Q. The trial you are referring to is the Grand Jury Investigation about a year ago?

A. Yes, that is right.

Mr. Margiotti:

Q. What I had in mind was, at the time the contract was signed was that submitted to the Government —the PWA?

A. That non-collusion affidavit?

Q. Yes.

A. No.

Q. You simply retained that in your own files?

A. Yes, we took it for ourselves.

* * * * * * *

Mr. Eckert:

[75] Q. Was this work done under the direction of the School Board—the construction of these different buildings?

A. Yes, it was directly under, you might say, the direction of the Building Department of the Board, as their particular department attends to that phase of the work.

* * * * * * *

JOSEPH J. MITCHELL recalled, testified as follows:

DIRECT EXAMINATION.

Mr. Margiotti:

* * * * * * *

[81] Q. Were they turned over to the contractor, and the contractor gets his pay on them?

A. Are the estimates turned over to him?

Q. Yes.

A. No. The estimates are turned over to the Controller of Allegheny County, and he pays the contractor, who receipts for the same.

Q. Who presents them to the Controller?

A. The Department of Public Works.

Mr. Eckert:

Q. Of the County?

A. Of the County, yes.

Mr. Margiotti:

Q. Will you state whether or not those estimates when they are prepared—whether they are submitted to the contractor?

A. Yes; the contractor signs them before he presents them to the Accounting Department of the Department of Public Works, and then from there they go to the County Commissioners, who also approve them for payment before they go to the Controller.

* * * * * * *

CROSS EXAMINATION.

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[83] *The Witness*: The reason I say that is because the PWA auditors—that is, the United States Government—make a separate audit every time they give us a percentage of the job. In other words, to begin with, they will make a first audit of ten per cent, and grant us ten per cent outright of the cost of the job; and then at a certain interval they will give us another fifteen per cent, and then another fifteen per cent, and—There is forty-five per cent involved, and the last ten per cent usually comes after the completion of the job, after all the estimates are paid. Now, when an estimate is paid it is shown right in the PWA audit, and, of course, we get ten per cent of that when the job is finished. In other words, any job—

* * * * * * *

HARRY HIVELY, a witness produced on behalf of the plaintiff, having been duly sworn, testified as follows:

CROSS EXAMINATION.

* * * * * * *

Mr. Eckert:

[101] Q. Mr. Hively, will you tell us from what fund these vouchers that you have produced here for the projects in question are actually paid?

A. This (indicating) is North Side Market, I don't know what exhibit number—

Q. I am not referring to that project alone, I mean all these projects.

A. Well, this particular North Side Market, we paid from two funds. That was the first grant we ever got from the Government, and we put their money in one bank account and put ours in the other, and we paid out of that from the Government and the City.

Q. And on the other projects, how did you handle them?

A. They were all paid out of the bond fund; originally they were all paid out of the bond fund.

Q. Your vouchers were paid out of a City account in which it puts the proceeds of bond issues?

A. Yes, sir.

Q. And then would you put the funds from the PWA into that bond account to reimburse it later?

A. Yes, sir.

* * * * * * *

Mr. Margiotti:

[102] Q. Do you maintain a construction account?

A. Yes, sir.

Q. And what goes into the construction account?

A. The proceeds from the bonds that we sold and the Government money that they turned over to us.

Q. In selling bonds, did you sell bonds for the entire cost of a project, or for fifty-five per cent of it?

Mr. Strassburger: If he knows.

Q. (Continuing) Of course. Don't answer, if you don't know; just say, "I don't know".

A. We sold bonds in the amount of eight million dollars, which we say was our fifty-five per cent; and then we called on the Government as the work progressed to get their forty-five per cent in.

Q. I see. So that this fund consisted then of money you got from the sale of bonds and the money you got from the Government. Your bond money was fifty-five per cent, and the Government's money was forty-five?

A. We didn't get the forty-five per cent yet; we were getting it gradually.

[103] Q. As you got it, anyhow, it went into that fund?

A. Yes.

Q. And these payments were made out of that fund?

A. Yes, sir, out of the bond fund.

Q. You call that the bond fund?

A. The bond fund construction account.

Q. Were there any other payments made out of this fund, the bond fund or construction account, as you call it, except for PWA projects?

A. No.

Q. Was there a bank used in connection with this account, or was it maintained by the City? Was there a bank used?

A. We put the Government money in one bank and put our money in another bank.

Q. And did you do that in all those cases?

A. All these cases.

Q. So that you kept the Government's money separate and apart even from the bond money?

A. We drew the warrants or checks on the bond fund.

Q. Yes?

A. Then we would apportion the certain amount that should be paid out of the Government fund and wrote out a check and got the money out of the Government fund and transferred it back into our fund for their share.

Q. But you kept the Government's money—

A. Separate.

Q. (Continuing)—separate and apart from your own funds?

A. Up until the time we started to spend it.

Q. And then when you had to spend it, you spent it as you were required to under the conditions laid down by the PWA?

Mr. Eckert: Objected to, as calling for a conclusion and leading.

Mr. Margiotti: All right. I withdraw it; I think it is both.

Q. When would you draw out of the Federal account?

A. Every fifteen days.

Q. And what would you draw?

A. We would draw a check on the Government money.

[104] Q. For what?

A. For part of these costs that had been going on, that we had originally paid from our fund.

* * * * * * *

Mr. Margiotti:

Q. Will you state whether or not you were permitted to withdraw the money that you had in a separate account in which you kept the Federal aid money—call it that—without the approval of the Government in some form?

A. We drew it out first without their approval,

but they would come along later and audit it and see if it was all right, and if it wasn't we would have to make a return. They haven't objected to anything yet.

* * * * * * *

[105] Q. And this original voucher is approved by the City account, the architectural designer, and the Director of the Department of Public Works. Is that correct?

A. Yes, sir; that voucher came from the Department of Public Works.

Mr. Eckert: Those are all officers of the City of Pittsburgh?

Mr. Margiotti: That is right; there is no question about that.

* * * * * * *

CROSS EXAMINATION.

Mr. Eckert:

[107] Q. Mr. Hively, who actually signed the checks which the contractors received on the projects to which you have referred?

[108] A. They were signed by a check writing machine, and on the plate was the Mayor, the Mayor's secretary, and the City Controller.

Q. Those are all officers of the City of Pittsburgh?

A. Yes.

Q. Were those checks countersigned by any PWA representative?

A. No, sir.

Q. When the Government money was received, as it has been referred to, was it deposited in an account in a bank in the name of the City?

Mr. Margiotti: That is objected to, because the bank account would be the best evidence.

The Court: Well, this witness is on cross examination. Go ahead.

Q. Answer the question.

A. In the City of Pittsburgh, PWA Docket Number

so-and-so, and the project,—street, sewers, playgrounds, or whatever it was.

Q. And that account was subject to check by the City of Pittsburgh?

A. Yes.

Q. And the City would from time to time draw checks itself against that account and deposit them to its bond account, out of which it originally paid for the electrical work on these different projects?

A. That is right.

Q. Nobody else except the City could check against that account. Isn't that right?

A. In that account the Mayor didn't sign those checks; it was the City Treasurer and the City Controller that signed those checks to get them over to our funds.

Q. But nobody other than the City could draw funds out of that account?

A. No, sir.

Q. The only difference in the case of the North Side Market job was that the City drew checks itself against this account in which you put the PWA money directly to the contractors. Is that it?

A. Yes, sir.

Q. But those were checks of the City of Pittsburgh?

A. Yes, sir.

Q. The exhibits which you have produced here, starting with a voucher on top, consist of a record of the check issued to the contractor, together with the supporting data which the City required before it made the payment to the contractor. Is that right?

A. That is right.

[109] Q. After the voucher on top—which, I take it, is made by the same operation of the machine as the check itself. Is that right?

A. Yes, sir.

Q. (Continuing) — is a paper entitled "Departmental Invoice. To be transmitted to Controller in duplicate. City of Pittsburgh". Is that wholly signed by officers of the City of Pittsburgh?

A. It is.

Q. And then the next sheet is one entitled "City of Pittsburgh, Department of Public Works, Bureau of Engineering. Current Estimate so-and-so". Are all of the officials who signed that estimate under this certification "I hereby certify that the work has been done in strict accordance with plans, specification and ordinances relative to the same, and that the contractor has fully complied with all the conditions of the contract" officials of the City of Pittsburgh?

A. Yes, these are all City of Pittsburgh officials.

Q. And are the signatures of the officials on the back of that Current Estimate form also those of officials of the City of Pittsburgh?

A. Yes. This is the engineer (indicating), and this is the probate clerk in our office who swears the engineer to the estimate (indicating).

Q. That is, the engineer of the City of Pittsburgh?

A. Yes.

Q. And the bottom sheet, entitled "Periodical Estimate for Partial Payment No. so-and-so", a yellow form, is also an estimate of the work done during the previous month, signed by the contractor first, then by Nathan Schein, Senior Designing Engineer, as an officer of the City of Pittsburgh?

A. He is; Nathan Schein is.

Q. And after it had been signed in this instance by Mr. Schein on October 21, 1939, it was signed by the PWA inspector on October 24, 1939. Is that right?

A. He is the Government inspector.

Q. Yes. PWA? Is that right?

A. Yes.

* * * * * * *

M. M. STEEN recalled, testified as follows:

• • • • • • • •

CROSS EXAMINATION.

Mr. Eckert:

[115] Q. By whom were the checks signed that the contractors received in payment for their work?

A. They were signed by the Controller.—

Q. Controller of what?

A. The School Board Controller; by the School Board Treasurer, the Secretary of the School Board, and either the President or Vice President of the School Board.

Q. Were those checks or any checks received by the contractors signed by any official of the PWA?

A. No.

Q. You say you would open a separate bank account for each one of these new schools?

A. That is correct.

Q. And in whose name was that account?

A. That was the Board of Education.

Q. The Board of Education of the City of Pittsburgh?

A. City of Pittsburgh—School District of Pittsburgh.

Q. And then, for your own accounting purposes, you would designate that with some number. Is that it?

A. Yes. It all came under Item 15, PWA construction account, and the moneys in there had to be certified to the Government that they covered the fifty-five per cent that we were obligated for. They had to be certified to by the bank officials.

[116] Q. But the account was in the name of the Board of Education of the City of Pittsburgh?

A. That is correct.

Q. And then, for your own record, you identified each account as No. 15?

A. That appears on all these checks—Item No. 15.

Q. And in those accounts you would deposit the proceeds of the sale of bonds of the School District?

A. Yes.

Q. And the funds received from the PWA, and any other funds of the School Board that might be available for the construction of these schools. Is that right?

A. That is correct.

Q. The PWA couldn't draw any funds out of those bank accounts, could it?

A. They could not.

Q. These periodical estimates for partial and final payment which you have produced here this afternoon were made up in way you outlined in your testimony either yesterday or the day before. Is that right?

A. Yes, they were.

Q. They would be signed first by your—that is, the Board of Education's registered architect and Superintendent of Buildings in charge of the job?

Mr. Margiotti: First by the contractor.

Q. (Continued) First by the contractor, and then by the men I mentioned?

A. That is right.

Q. In this case yourself? (Indicating file marked as an exhibit)

A. Yes.

Q. On the one I am showing you, relating to the South Vocational School?

A. Yes.

Q. And then by the PWA inspector?

A. That is correct.

Q. Now, could not the School District pay the contractor even though the inspector of the PWA on that particular job did not certify that the amount of work that the periodical estimate called for had been done?

A. I think they could have paid if they had cared

to jeopardize the grant participation in the amount he did not attest to.

[117] Q. But the School Board, could, if they had wanted to, pay the contractor even though the PWA inspector had not concurred in that particular payment?

A. I think they could.

* * * * * * *

HARRY HIVELY recalled, testified as follows:

* * * * * * *

CROSS EXAMINATION.

Mr. Eckert:

[120] Q. Just so we get this straight, Mr. Hively, is it correct that the checks that were issued to the contractors in payment for their work were checks issued and signed wholly by officials of the City of Pittsburgh on the bond account of the City of Pittsburgh?

A. That is right.

Q. And into that bond account, which I take it was in the name of the City, wasn't it?

A. Yes, sir.

Q. You would deposit from time to time funds that you had received from the PWA. Is that right? But you deposited those funds from the PWA first in a separate account?

A. Yes.

Q. And then from time to time transferred the funds from that PWA account to your bond account?

A. That is right.

Q. Now, this account in which you first deposited the PWA money after the City received it was also in the name of the City of Pittsburgh. Isn't that right?

A. Yes, sir.

Q. And that account was subject to check only by the City of Pittsburgh?

A. That is right.

* * * * * * *

LOUIS C. GROSHARDT, a witness produced on behalf of plaintiff, having been duly sworn, testified as follows:

* * * * * * *

CROSS EXAMINATION.

Mr. Eckert:

[130] Q. The electrical contractor was paid by the School District of the Borough of Chalfant?

A. All bills were paid by the School District on the construction of the building.

Q. The checks that the contractor received in payment for the electrical work were checks of the School District of the Borough of Chalfant?

A. That is right; a special account they had, a construction fund, to keep it separate from other school funds.

Q. Was that construction account in the name of the School District in the bank?

A. Yes. The School District had various accounts, and designated as Chalfant School District Construction Accounts, and similar Sinking Fund Accounts, and all in the name of the School District.

Q. And that account was subject to check only by the School District of the Borough of Chalfant?

A. That is right.

Q. And in that construction account you deposited the proceeds from the sale of the bonds, and also what money you received from the PWA?

A. Yes.

* * * * * * *

PAUL HUGHES, a witness produced on behalf of the plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Margiotti:

* * * * * * *

[143] Q. State how you handled your bank transactions with reference to the construction of this school.

A. We set up a separate bank account for this job only, under instructions from PWA to do so, and the officers of the Board were given authority to pay contractors upon approval of the work by the architect and approval by the PWA inspector.

Q. And what funds did you place in that account?

A. We placed in the fund the amount of approximately $7,000 from the Board's current funds, the forty-five per cent as we received it from the Government, and the balance was a small bond issue which we floated.

Q. In other words, then, you put your fifty-five per cent and the Government's forty-five per cent in the same fund, and you paid for the entire job out of that fund?

A. That is right.

Q. I assume, after obtaining approval, the School Board did the paying?

A. Yes.

Q. That is all. Bring that file with you when you come back—that big, thick file.

CROSS EXAMINATION.

Mr. Eckert:

Q. By whose checks was the contractor, the Industrial Electric Company, for the electric work, paid?

A. By the School Board's check, specially marked to show this separate bank account which we had set up.

Q. The checks, however, were signed solely by officers of the School Board. Is that right?

A. Yes.

Q. In whose name was this bank account?

A. The bank account was in the name of Ross Township School District—Construction Account was the way we labeled it.

[144] *Mr. Margiotti*:

Q. What is that?

A. PWA Construction Account was the way we labeled it.

Mr. Eckert:

Q. That is the way you identified it from your other accounts?

A. Yes, from our other account.

Q. But in this account you placed some current funds belonging to the School District, the proceeds of some bond issue that the School District sold, and the fund received from the PWA?

A. That is right.

Q. The architect that you referred to was empolyed by the School Board?

A. Yes.

* * * * * * *

Q. These papers constituting Exhibit 122, entitled "Periodical Estimate for Partial Payment", Partial No. 2, No. 3 and "Periodical Estimate for Partial Payment No. 4 and Final", were furnished by you to the contractor. Is that it? Or did the architects make those up?

A. They came to me from the architect.

Q. The first that you know about that—

A. The first I saw them, I get them from the architect.

[145] *Mr. Eckert*: Well, we object to the understanding and ask it be stricken.

The Court: It may be stricken.

Mr. Eckert:

Q. The first you know about these sheets that comprise Exhibit 122 is that you received them from your architect?

A. That is right.

Q. And who was your architect in charge of this job?

A. Press C. Dowler.

Q. And after you received these periodical estimates, what would you do then?

A. If they were also approved by the PWA registered engineer inspector, I made checks for them, had them signed by the proper officers of the Board, and paid the contractor.

Q. Mr. Dowler was in charge of the construction of this school, was he?

A. Yes.

* * * * * * *

WALTER R. DRIPPS resumes the stand.

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CROSS EXAMINATION.

Mr. Eckert:

[155] Q. That account was in the name of the Borough of Blawnox. Is that right?

A. Yes, sir.

[156] Q. Who could check on that account—that is, just the Borough of Blawnox. Is that right?

A. The Borough of Blawnox, yes, sir.

Q. And nobody else?

A. Nobody else.

Q. The checks that were issued to the contractor in payment for his work on the Blawnox Municipal Building were signed solely by officers of the Borough of Blawnox. Is that right?

A. Yes, sir.

Q. I show you one of those checks, and ask you whose signatures those are on there—not the names of the men, but what offices they held.

A. President of Council, and the Borough Secretary, myself.

Q. And the Borough Treasurer over here (indicating)?

A. Yes, sir.

Mr. Margiotti: If Your Honor please, so as to shorten that branch of the case, I am willing to stipulate that on all these accounts the checks that were given to the contractors in payment for their work were signed by officers of the sponsors, and that there appeared no name of an officer of the PWA, and that will shorten it in all these cases. I am willing to stipulate that on the record, because that is the way it was done. That is what you are trying to prove, and I am willing to stipulate that is true.

Mr. Eckert: Of course, that is all right with us. That is, of course, in accordance with what we understand to be the fact, and what we are trying to bring out.

Mr. Margiotti: And there is no question about it. So I am willing to stipulate it, that all checks in each project referred to in the complaint—payment was made by checks issued by the sponsors on bank accounts which are to be described, of course, by each witness.

Mr. Eckert: And that the checks were signed solely by officers of the local municipality which entered into the contract with the contractor?

Mr. Margiotti: Yes, that is true.

Mr. Eckert: And that they were the checks of the local municipality.

Mr. Margiotti: I will agree that they were the checks so long as that does not imply it was the

fund of the municipality. I will agree to that, that they were checks—that is, the paper itself or the check book was a check book of the municipality. That is true.

Q. These periodical estimates for partial payment, as well as the estimate for final payment, were presented to you and were the basis on which you wrote the checks, the checks that were given to the contractor in payment for his work. Is that right?

[157] A. Yes, sir.

Q. I am referring to the periodical estimates for partial payment and the final estimate which comprise a part of Exhibit 130.

A. That is right.

Q. In addition to funds received from the PWA, what other funds did you deposit in this account in the Aspinwall Branch of the Commonwealth Trust Company?

A. $21,450.00 of Borough money.

* * * * * * *

WALTER D. FERREE, a witness produced on behalf of plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Margiotti:

* * * * * * *

[166] A. We employed a clerk of the Works on our project, and these items were paid on authorization from him by memorandum.

* * * * * * *

CROSS EXAMINATION.

Mr. Eckert:

[171] Q. The work was done by the contractors with whom the School District of the Borough of Wilmerding contracted?

A. That is right.

Q. The electrical work by the Morris Engineering Company?

A. That is right.

Q. And the work was done under the direction of the architects hired by the School District. Isn't that right?

A. Yes, sir.

Q. And you also had a clerk employed, as you say, who was in constant and detailed contact with this one job?

A. That is right.

Q. And in addition to that, the PWA had an inspector there?

A. Yes, sir. The architect had his inspector in addition to the clerk of the Works who was on the job. That is right.

Q. You had your architects in charge of the work, and, in addition to that, the architects had one of their inspectors, as you say, on the work all the time?

A. Yes, sir, full time.

Q. And you had this clerk hired by the School Board on the job all the time, too. Is that right?

A. That is right.

Q. Was the PWA inspector there all the time or not? Do you know that?

A. I believe he had another project under his supervision.

Q. So he would only be at your school part of the time. Is that right?

A. That is right.

Q. The immediate direction, then, was under the School District?

A. That is right.

Q. In whose name was this account in the bank that you referred to?

A. Wilmerding School District.

Q. And that was subject to check only by the Wilmerding School District?

A. That is right.

Q. The estimates for payment, such as Exhibit No. 136, were presented to you. Is that right?

[172] A. That is right.

Q. As the Secretary of the School Board. Is that right?

A. Yes, sir.

Q. And then was it you who wrote the checks to the order of the Morris Engineering Company?

A. Yes, sir.

Q. And those checks it is agreed were signed solely by officers of the School Board?

Mr. Margiotti: If you are going to repeat that every time, I am going to withdraw the agreement.

Mr. Eckert: That is agreed to, is it?

Mr. Margiotti: Very much so.

* * * * * * *

Q. Were there some extras added to the electrical work which the Morris Engineering Company did?

A. Yes; a change in a panel or something of that nature.

Q. Was the amount of the contribution from the PWA increased on account of that extra work, Mr. Ferree?

A. No, sir.

Q. What was the amount that you actually received from the PWA?

A. $206,182.00.

Q. And the extra work, then, was paid for wholly by the School District of the Borough of Wilmerding?

A. That is correct.

Q. The architects that you referred to were hired by the School District?

A. Yes, sir.

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ALFONSE R. FERRUCI recalled, testified as follows:

* * * * * * *

CROSS EXAMINATION.

Mr. Eckert:

[174c] Q. Do I understand that the final estimate forms which are bound together as Exhibit 137 would come to the City, and it was on the basis of those, then, that the City would make the payment?

[174d] A. That is right.

Q. These forms, then, were presented to the City in order that the contractor could get his money from the City. Is that right?

A. Yes, sir.

* * * * * * *

WILLIAM C. EVANS, a witness produced on behalf of plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Margiotti:

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[181] Q. Mr. Evans, the Terms and Conditions have a requirement concerning the construction account. I suppose you are acquainted with that requirement?

A. Yes, sir.

Q. What did you do with reference to that requirement on the maintenance of a bank account in connection with the project?

A. We opened an account, labeled under the name Construction Account School District of the Borough of Braddock, in the First National Bank of Braddock.

Q. Did you give it a number?

A. No; just Construction Fund, is what it was called. That is all the check was headed, and there is a regular voucher that the School District uses, signed by the president and the secretary of the Board.

Q. And what went into that construction account?

A. In that we deposited a certain amount of fire insurance money that we had received for a building that was destroyed by fire; and, in addition to that, we deposited two bond issues—one for $175,000.00, and one for $115,000.00—plus the extras we received in selling the bonds. That is the total amount of money that we deposited of the District's in that fund.

Q. Did that make up your share as required by the contract?

A. That was more than our fifty-five per cent of what we estimated it would cost.

Q. You provided a little more than the required amount?

A. We put a cushion in there.

Q. And what did the Government put in the fund?

A. Why, the Government put in—of course, all the money they gave us they put in—the number of payments. They paid approximately forty-five per cent of the cost of the building, although not quite, because on most of the PWA jobs there were little fines and assessments and penalties in which they didn't participate.

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CROSS EXAMINATION.

Mr. Eckert:

[184] Q. Mr. Evans, the School Board hired some architects. Is that right?

A. Hired an architect.

Q. And the architect prepared the plans for the school. Is that right?

A. The plans and specifications.

Q. And the specifications, as well as the plans. Is that right?

A. Yes.

Q. And the architect then supervised the construc-

tion of the school in accordance with the plans and specifications which he had prepared for the School Board?

A. After the approval of the Department of Public Instruction, and the Art Commission, and the Department of Labor and Industry, and the PWA approved them, they started on the job.

Q. After the plans and specifications had been approved by those various bodies?

A. That is right.

Q. Including the local Bureau for the building permit, and one thing and another. When the construction started, then the architect supervised the construction. Isn't that right?

[185] A. The architect and the clerk we had appointed, who had been a contractor. He assisted the Board—a man by the name of Miller.

Q. The School Board, in addition to hiring an architect to draw the plans and specifications for this new school house, and superintend its construction, also hired a former contractor as a clerk, also to supervise the construction of that school. Is that right?

A. Not supervise; just to check that the building was built according to the plans and specifications. The various contractors supervised their own work. He just checked what they were doing.

Q. That is what this clerk did?

A. Yes; that was his job. He wasn't boss. He was just working in the interest of the Board, to see that we were getting what we were contracting for.

Q. In the interest of the School Board?

A. That is right.

Q. And so was the architect?

A. That is right.

Q. Was this so-called clerk that you hired on the job all the time?

A. Yes, sir.

Q. And was your architect on the job all the time?

A. Well, if he wasn't, he had a draftsman who worked for him, made out the detailed drawings, and he was there all the time—the man who was making out the detailed drawings available for the contractors.

Q. That was an employee—

A. An employee of the architect, a draftsman.

Q. And then the PWA also had an inspector?

A. That is correct.

Q. And he saw, also, that the work was progressing in accordance with the contract. Is that right?

A. That is right.

Q. Was that PWA inspector there all the time or not—do you know?

A. No, I think he had a number of other dockets.

Q. So he could only be there part of the time?

A. His office was there, and from there he migrated to different places—from there he left to work at different other jobs.

Q. So he would only be part of the time on your particular job?

A. That is correct.

* * * * * * *

[186] Q. The account was in the name of the School District of the Borough of Braddock, and it had some suffix to it. Is that right?

A. That is right—Construction Fund.

Q. Just how would you get the funds from the PWA? Would they come in the form of a check to the order of the School District of the Borough of Braddock?

A. That is right. I don't know just exactly, but they were paid to the Treasurer of the School District of the Borough of Braddock. He deposited it in the account.

Q. The Treasurer of your School Board would deposit that check in this account in the name of the

School District, with the suffix "Construction Account." Is that right?

Mr. Margiotti: This witness knows nothing about that.

Mr. Eckert: You asked him about that.

A. That is right. I saw the checks.

Mr. Margiotti: I didn't ask him anything about deposits.

[187] A. (Continued) I saw the checks. They came in on the same scheme as we get State subsidies from Harrisburg. They come to the Treasurer of the School Board.

Q. You say you saw those checks from the PWA to the Treasurer of the School Board?

A. I think I saw most of them, yes. He is the man who received them. I couldn't tell you just exactly what was written on them, but I know it was practically the same as we use for State subsidies received for the public schools.

Q. So it wasn't a case of the PWA, through its own officials, depositing those checks in this construction account?

Mr. Margiotti: That is objected to as a conclusion. The witness has told you what the check contained.

Mr. Eckert: You assumed something like that in your questions, Mr. Margiotti, and therefore we ought to get it straight on the record.

Mr. Margiotti: I object to it as a conclusion.

(Previous question read by reporter)

Mr. Margiotti: I will withdraw that. Do you mean some PWA man went there and put the money in the bank?

Mr. Eckert: That is right.

Mr. Margiotti: No objection to that.

A. No, he didn't. The Federal Government sent us

the check, and either my secretary or the Treasurer of the Board deposited them.

* * * * * * *

RE-DIRECT EXAMINATION.

Mr. Margiotti:

[197] Q. Before payment is made on these final estimates, the Government approves that payment for a particular purpose—

* * * * * * *

A. You pay on the I-23s for each contractor.

Mr. Eckert:

Q. And when you say you pay, you mean the School District of the Borough of Braddock?

A. That is correct.

Mr. Margiotti: Well, the School District actually issues the check.

The Court: That has appeared all through this case, that the payment is made by the local agency that is doing the work.

Mr. Eckert: That is right.

* * * * * * *

[199] Q. All that we want to establish is that the contractors were paid upon the presentation of these so-called periodical and final estimates to the secretary of the School Board, pursuant to a resolution passed by the School Board of the School District of the Borough of Braddock some time previously. Is that the fact?

A. That is the fact.

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WALTER R. DRIPPS, recalled on behalf of plaintiffs, testified as follows:

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CROSS EXAMINATION.

Mr. Eckert:

[211] Q. Mr. Dripps, isn't it a fact that the Borough of Blawnox hired an architect to prepare the plans for this new municipal building?

A. Yes, sir.

Q. Who was that architect?

A. John H. Phillips, Pittsburgh.

Q. And did Mr. Phillips also prepare the specifications for this new building?

A. Yes, sir.

Q. And did he either personally or through employees of his superintend and supervise the construction of this new building?

Mr. Margiotti: That is objected to, as calling for a conclusion; just what did he do.

The Court: I think that calls for an expression of opinion of this witness, what the architect did, rather than asking him pointblank if he did not supervise the construction and furnish architect's certificates, and so forth. I think you can ask him that—as to the amount of work completed. You can draw out of him anything but an expression of opinion or conclusion of this witness. In other words, you cannot get him to interpret the contract between the Borough and the architect.

Q. Well, have you the contract between the Borough and the architect?

A. No, sir.

Q. Will you get that, please?

A. I think I have that,—I am not sure. I would have to hunt that up.

Q. Will you get that, please?

Mr. Margiotti: If the Court please, these contracts between the contractor and the Borough cover specifically the duties of the architect, just what he does, what the contractor is required to do; there is a special provision in the contract on that, so I think so far as we—

[212] *The Court*: If there is any question about the Borough employing the architect, and so forth, we had better have the contract, if you cannot agree upon that.

Mr. Margiotti: I don't dispute that at all; that is what happens in all these cases. The sponsor employs the architect, and the architect draws the plans, and they are submitted to PWA for approval.

Mr. Eckert: The architect also supervises the construction of the project.

Mr. Margiotti: That is not the fact.

Mr. Eckert: That is the fact.

Mr. Margiotti: I don't agree with you.

Q. Was there a written contract between the Borough and Mr. Phillips, the architect?

A. Yes, sir; some kind of a contract, but I don't know what it was, I don't have that; the attorney took care of that.

Q. Will you please try to get that and bring it in?

A. I will try to get it, yes, sir.

Q. During the construction of this new municipal building, was the architect, Mr. Phillips, or some employee and representative of his there all the time or not?

A. Well, most all the time; I wouldn't say all the time, but most all the time there was someone there.

Q. And just what did the architect or his representative, employee do?

A. Well, they were there to see that the building was constructed according to plans and specifications of the building.

Q. How often would the PWA inspector be there?

A. Every day.

Q. How long each day?

A. I would say on an average of about an hour a day, some days a little longer, some days not quite so long.

Q. Did he also have some other jobs under his inspection, do you know?

A. I understand that he had.

Q. Did he have an office at the Municipal Building?

A. No, sir; his office was in Oakmont, across the river.

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WILLIAM A. ENGLAND, a witness produced on behalf of plaintiffs, having been duly sworn, testified as follows:

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CROSS EXAMINATION.

Mr. Eckert:

[233] Q. Who wrote the checks to pay the contractor?

A. I did.

Q. And did you do that upon presentment to you of those periodical estimates for partial and final payment?

A. After they were properly approved, and also approved by Borough Council, then a voucher was drawn in payment for work done.

[234] Q. Well, those periodical estimates for partial and final payment, then, which collectively comprise Exhibit 167, were finally presented to you for actual payment to the contractor. Is that right?

A. They were.

Q. Would the Borough Council pass a resolution authorizing each payment to the contractor, Mr. England?

A. Not a resolution; motion by Council.

Q. But there was a separate motion by the Borough Council directing each payment to be made to the contractor. Is that right?

A. There was.

Q. Are those motions noted in that history of the building that you produced?

A. They are.

Q. You also said that contract was awarded to the Diamond Electric Company. Do you mean awarded by the Borough Council?

A. By Borough Council, yes.

Q. Were there any extras to the electrical work over and above what was called for by the contract?

A. There was.

Q. That is, I mean on this new Municipal Building.

A. There was some extra work done by the electrical contractor that was not included in the original contract.

Q. And you said the amount of the grant was $31,500.00?

A. $31,500.00.

Q. Was the amount of that grant increased on account of those extras to the electrical work?

A. It was not.

Q. What was the total cost of the building?

A. The four contracts?

Q. Yes, all the work.

A. $74,749.00.

Q. How often would the PWA inspector be at this new building during its construction, Mr. England?

A. Well, he would be there three or four times a week. Some days he wouldn't spend much time there, but he was there very often as a majority.

Q. Well, you would say about three or four times a week?

A. Yes.

Q. Some days he wouldn't be there at all, then. Is that right?

A. That is true.

[235] Q. Did he have other projects under his supervision, also?

A. Well, I am not certain, but I believe he had.

Q. Were the architects, Schoeneman and Carter, hired by the Borough?

A. They were.

Q. In addition to the architects on that job, did the Borough hire anyone else in connection with the construction of that building?

A. Just what do you mean by that?

Q. I mean, in addition to the architects, did the Borough have any other representative present during the construction of the building?

A. Oh, yes; the Borough had an inspector.

Q. You mean a man hired by the Borough?

A. Hired by the Borough, but not paid for out of this fund.

Q. What kind of a man was he?

A. Well, he had been in the general contracting business.

Q. And was he there all the time?

A. He was there from March until September.

Q. Of what year?

A. 1938.

Q. All the time?

A. All the time.

* * * * * * *

[238] Q. Mr. England, was the bank account that you referred to before in the name of the Borough of Crafton?

A. The Borough of Crafton, Municipal Building Construction Account.

RE-DIRECT EXAMINATION.

Mr. Margiotti:

Q. Now, Mr. England, in obtaining Government grant for this construction, who made the initial move? Was the initial move made by the Borough or by the Government?

A. The initial move was made by the Borough, through its Committee.

Q. In other words, you first decided to put up this building?

A. That is right.

Q. Then you made a request of PWA for a grant?

A. That is right.

Q. And upon that request came the offer?

A. That is right.

Q. And that was followed by the acceptance?

A. That is correct.

Q. By the way, did the inspector, the resident engineer or resident inspector of PWA, have a room or quarters on the job?

A. There was a room, or part of a room, prepared for him, but he never used it.

* * * * * * *

RE-CROSS EXAMINATION.

Mr. Eckert:

[242] Q. Mr. England, was the offer from the PWA of a grant received by the Borough and was that offer accepted before the Borough even advertised for bids from contractors?

A. It was accepted.

Q. Before the Borough even advertised for bids? Is that right?

A. That is right.

Q. Consequently, the offer from the PWA of the grant of $31,500.00 was received and accepted by the Borough before you ever entered into any contract with

the Diamond Electric Company or Mr. Leeke. Isn't that right?

A. That is right.

Q. Was the amount of the grant from the PWA increased or decreased any because of the amount of the contract for the electrical work with the Diamond Electric Company?

A. No, it was not.

Q. You referred to a committee. What committee was that that you referred to?

A. A committee known as the Building Committee appointed by the President of Council, and comprised of four men, members of Council.

Q. And what was the function of that committee?

* * * * * * *

A. The function of that committee was to be—at least one member of the committee to be on the site each day to see how the work was progressing, in addition to the inspector that the Borough Council had employed.

Q. You mean, that Committee of Council was in contact and in charge of the actual work?

A. It was.

[243] *Mr. Margiotti*: That is objected to as calling for a conclusion, and we ask that be stricken out. The committee could not have been in charge of the actual work.

The Court: You can only get testimony from this witness as to what the committee did on the job.

Mr. Margiotti: I don't object to that, but I certainly object to the conclusion.

The Court: The objection, in so far as it related to the answer stating what the function of the committee man was, is sustained, and the answer stricken.

Q. Tell us what the committee did.

A. The members of the committee would see what had been done during the day, and if there were any changes to be made, the committee would take it under advisement; later on that committee would report to Council, and Council would act upon the suggested changes.

Q. When you said "during the day", do you mean members of that committee, or one of them at least, would be at the site of the work during the daytime?

A. Yes. I know one member of the committee who spent almost the entire day, because his business was so located that it was just a few feet from his location to the location of the new building.

Q. You mean, he did that just on one day?

A. Oh, no. He was there every day.

Q. In this letter marked Exhibit 168, there is a reference at the bottom to Mr. Vincent Schoeneman. Who is he? Do you know?

A. Mr. Schoeneman is an architect.

Q. Was he one of the firm of architects that the Borough hired?

A. He was one of the two selected by the Borough, a resident of Crafton Borough.

Q. Are those the architects who prepared the plans and specifications?

A. They did.

* * * * * * *

MRS. LENA Z. KENNEY resumes the stand.

* * * * * * *

CROSS EXAMINATION.

Mr. Eckert:

* * * * * * *

[254] Q. Mrs. Kenney, in whose name were these two bank accounts that you referred to on direct examination?

A. The School District of the Township of Mount Lebanon.

Q. And were those accounts subject to check only by the School District of the Township of Mt. Lebanon?

A. Yes.

Q. And the checks were written by you as secretary of the School District. Is that right?

A. Yes.

Q. And you wrote those checks upon presentment to you of these periodical estimates for partial and final payment, which collectively on the one school are known as Exhibit 178, and on the other school as Exhibit 179. Is that right?

A. I did.

Q. That is right, is it.

A. Yes; after motion by the Board.

Q. That is, the School Board of the Township of Mount Lebanon?

A. Yes; they approved it.

[255] Q. Did the School District of the Township of Mount Lebanon also receive loans from the PWA on account of these two schools or did you sell the bonds to someone other than the PWA?

A. We did not receive the loan; we sold the bonds to other parties.

Q. Not to the PWA?

A. Not to the PWA.

Q. That applies to both schools?

A. Both schools.

Q. I notice that the periodical estimates for partial payment on the Lincoln School are signed by Ingham & Boyd, architects.

A. They are.

Q. The one I am looking at by "Charles P. Ingham, partner". What connection did they have with the Lincoln School work, Mrs. Kenney?

A. Architects employed by the Board.

Q. By the Board of Education of the School District of the Township of Mount Lebanon?

A. They were.

Q. Were those architects on that job constantly during its construction?

A. The architect or someone employed by him inspected—they were additions, and I don't know—they weren't there all the time, but they were there frequently.

Q. Well, either the architect or some employee of theirs was there constantly throughout the work. Is that right?

A. Yes, some employee.

Q. Was the PWA inspector there all the time or not?

A. He was there frequently, but I don't know how often he was there.

Q. Well, was he there constantly?

A. No.

Q. He would be there off and on?

A. Off and on.

Q. And does the same apply also to the Markham School?

A. The same.

Q. Did the School Board of the School District of the Township of Mount Lebanon also employ Ingham & Boyd to prepare the plans and specifications and superintend the alterations of the Markham School?

A. They did.

* * * * * * *

[256] Q. I say, was the offer from the PWA received and accepted before you advertised for bids?

A. Yes.

[257] Q. And, of course, therefore the offer from the PWA was received and accepted by the School Board before it entered into any contract with Mr. Ross on the Lincoln School and Mr. Stauffer on the Markham School. Is that right?

Mr. Reich: That is objected to, as calling for a conclusion on the part of the witness; the records speak for themselves.

Mr. Eckert: It is a question of fact as to the order of time.

Q. (Question read).

A. The offer, yes.

Q. That is, the offer from the PWA was received by the School Board and accepted by it before the School Board entered into the contract with Mr. Ross on the Lincoln School or with Mr. Stauffer on the Markham School?

A. Yes.

Q. Was the amount which you received from the PWA on either one of these schools affected or changed by reason of the amount of the contract between the School Board and Mr. Ross on the Lincoln School or Mr. Stauffer on the Markham School?

Mr. Reich: That is objected to, as definitely calling for a conclusion on the part of the witness.

Mr. Eckert: I am asking her if there was any change in the amount of the grant.

Mr. Reich: You asked her opinion, whether it was affected by the change.

The Court: You can ask her if there was any change, any enlargement in the amount of the grant, by reason of changes in the plans, in the work done.

Q. Mrs. Kenney, was there any change in the amount of the grant from the PWA on account of either one of these schools by reason of the amount of the contract with Mr. Ross on the Lincoln School or Mr. Stauffer on the Markham School?

A. As I remember, there was not.

Q. In each case you received exactly the amount of grant which had been offered and accepted before you even advertised for bids. Isn't that right?

A. As I remember, yes.

Q. Well, that is very easily checked. The amount of the offer on the Lincoln School via of a grant was $13,909. Is that right?

A. Yes, $13,909.

Q. And was that the exact amount that you received from the PWA on that?

A. Yes.

[258] Q. And on the Markham School was the amount of the grant contained in the offer $21,273?

A. Yes.

Q. And was that the exact amount received?

A. Yes, it is the exact amount I have.

Mr. Strassburger:

Q. In other words, Mrs. Kenney, the maximum which you received from the Government on either of these jobs was fixed, no matter what the price of the building was?

A. Yes, unless we made a request and went through—

Q. And you did not get forty-five per cent on either of these jobs, did you?

A. Yes, we did get forty-five per cent. There is a difference here because we added more to our amount—I mean the School District's amount.

Q. Then you didn't get forty-five per cent of the total cost.

Mr. Reich:

Q. You got forty-five per cent of what you originally asked for?

A. Yes, we got forty-five per cent of what we originally asked for.

Mr. Strassburger:

Q. But you didn't get forty-five per cent of the cost of the building in either case?

A. No, not as completed.

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HENRY WADKOWSKI, a witness produced on behalf of the plaintiffs, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

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Mr. Reich:

[264] Q. Was the electrical work finished on this project, Mr. Wadkowski?

[265] A. Yes, sir, it was.

Q. State whether or not it was paid for.

A. Yes, sir.

Q. In full?

A. Yes, sir.

Q. By the Borough of Braddock?

A. Yes, sir.

* * * * * * *

[267] Q. Did the Borough of Braddock receive the money from the PWA, in accordance with its offer and acceptance?

A. Yes, sir, it did.

Q. And what did the Borough of Braddock do with the money it received from the PWA?

A. It was deposited in a special fund, which was marked "Waterworks Improvement Account, 1937".

Q. The balance of the money for the building of this filtration plant was raised by what method?

A. By the sale of bonds, Councilmanic bonds.

Q. And what became of the proceeds of the sale of those bonds? What was done with them?

A. It was also deposited in the construction fund.

Q. It was also deposited in the same account?

A. Yes, sir.

Q. Have you amongst your records Form No. 81, termed weekly payroll sheets?

[268] A. Not to my knowledge, sir.

Q. Did you ever have?

A. I never saw them.

CROSS EXAMINATION.

Mr. Eckert:

Q. This bank account that you referred to, Mr. Wadkowski, was in the name of the Borough of Braddock, was it?

A. Yes, sir, it was.

Q. And to identify it from your other accounts, you called it Water Works Improvement Account, 1937. Is that right?

A. That is right, sir.

Q. Was 1937 the year in which you opened that account?

A. Yes, sir.

Q. Was that account subject to check only by the Borough of Braddock? Could anybody else check on that account?

A. No, sir.

Q. Who wrote the checks on that account?

A. I did.

Q. And did you write those checks to pay the contractors upon receipt of the estimates for partial payment, collectively identified as Exhibit 189?

A. Yes, sir, I did.

Q. Who were The Chester Engineers?

A. The Chester Engineers were the engineers who

made the plans and looked out after the interests of the Borough during the construction of the filtration plant.

Q. You say they are a firm of consulting engineers. Is that right?

A. That is right.

Q. By whom were they hired in connection with this project?

A. By the Borough of Braddock.

Q. And you say they were to look after the interests of the Borough in connection with the construction of this water works?

A. Yes, sir.

Q. In addition to drawing the plans for this water works, what else did The Chester Engineers do in connection with this new filtration plant?

A. Well, they more or less looked to the Borough's interest as the work was progressing on.

[269] Q. Were they there during the construction of the work?

A. Yes, they were. I don't believe they were there all the time. If there was a matter came up, our Superintendent of Public Works would get in touch with The Chester Engineers and their man would be out, if a problem had arisen during the construction.

Q. Did the Borough have an engineer of its own on this job?

A. Well, our Superintendent of Public Works, Mr. G. M. Dillon, is also an engineer, and he looked out after the Borough's interests.

Q. Did he also devote his attention to this water works job?

A. Yes, sir, he did.

Q. That is Mr. G. M. Dillon?

A. That is right.

Q. I notice on these periodical estimates for partial payment, collectively marked Exhibit 189, there is a

stamp which says "Approved for Payment, Water Committee", signed by three men. What does that mean?

A. That means that was approved by the Water Committee, councilmen on that particular committee, who O. K. the bills for payment; and Mr. Dillon, being the superintendent, he O. K.'s it, also.

Q. The Water Committee was a committee appointed by the Borough Council of the Borough of Braddock. Is that right?

A. That is right.

Q. And would these forms collectively marked Exhibit 189 be presented to you for payment to the contractors?

A. Yes, sir, after the signatures were on there.

Q. The actual payment was made by you upon presentment to you of these periodical estimates marked Exhibit 189. Is that right?

A. Yes, sir.

Q. Was the PWA inspector on this job all the time, or would he only be there from time to time?

A. He was there only from time to time.

Q. Did he have his office on this job or somewhere else?

A. He did not have his office in Braddock at the time.

Q. You say he did not?

A. No, sir.

Q. Did he have other jobs under his inspection, too, do you know?

A. As I recall, he did.

Q. What was the amount that you actually received from the PWA?

A. $98,931, sir.

[270] Q. That was the exact amount of the grant specified in the offer?

A. Yes, sir.

Q. The amount of that grant, then, was not in-

creased on account of the extras to the electrical work over and above what was specified in the original contract between the Borough and the Ross Electric Company. Is that right?

A. No, sir.

Q. Is that right?

A. That is right.

Q. Do you know the total cost of this new filtration plant?

A. Not exactly, sir.

Q. Approximately?

A. It is approximately $223,000.

Q. Was that offer of a grant from the PWA—

A. Pardon me—can I interrupt, sir? I believe the approximate cost was $243,000.

Q. Was that offer of a grant from the PWA received and accepted by the Borough of Braddock before it advertised for bids for the electrical and the other work necessary in order to construct this new water works?

A. Yes, sir.

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E. J. WALDMAN, JR. resumes the stand.

DIRECT EXAMINATION (Cont'd.).

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Mr. Reich:

[282] Q. Did I understand you to say that you have a Township engineer?

A. That is right.

Q. And he employed the services of a consultant?

A. A consultant.

Q. Chester Engineering Company?

A. That is correct.

Q. Was a contract entered into between the Town-

ship and the Chester Engineering Company? Was there a written contract—do you know?

A. There was a contract between the Township and F. G. Ross, and in that contract it was mentioned that The Chester Engineers were acting as consultants, but we had no direct contract with Chester.

Q. Who is Mr. Ross?

A. Mr. Ross is the Township Engineer.

Q. You say now that the Township entered into a contract with its own engineer in reference to his services for this project?

A. That is correct.

Q. And was that contract in writing?

A. It was.

Q. Have you that contract with you?

[283] A. No, sir.

Q. Will you produce it?

A. I will be glad to.

CROSS EXAMINATION.

Mr. Eckert:

Q. Was Mr. Ross at this new Water Works every day?

A. To my knowledge, Mr. Ross inspected the work at the new pumping station several times a week. I could n't say he was there every day, but he was there many times throughout the week. Possibly he would be there three or four times in one day.

Q. Just what was Mr. Ross' connection with that job?

A. Mr. Ross was the supervising engineer on this whole project, and as such he had supervision over this contract, which is part of this PWA docket.

Q. You mean, he had charge not only over the electrical contract, but also the contract for the heating, the plumbing, and the general construction?

A. That is correct.

Q. Did the Township hire anybody else besides Mr. Ross in connection with this new water softening station?

A. Yes, the Township hired an inspector.

Q. And how much of the time was he on the job?

A. He was on the job all the time. He was on the job all the while that there was any work going on by any of the contractors.

Q. Would he be there eight hours a day?

A. Yes, sir.

Q. Every day?

A. Every day.

Q. How often would the PWA inspector be there?

A. The PWA inspector would be there, to my knowledge, also several times during the week. It would be pretty hard to say just how often he was there, but he kept in very close contact with the whole job.

Q. Did he have other jobs under his inspection, also?

A. I understood that he had.

Mr. Reich: I ask that the Court strike that answer from the record, because the witness definitely has stated he doesn't know from his own knowledge, except he understood.

The Court: We decline to strike.

[284] Q. This bank account was in the name of the Township, was it?

A. It was.

Q. And subject to check only by the Township?

A. By the Township of Shaler, yes, sir.

Q. And only by it?

A. And only by the Township of Shaler.

* * * * * * *

Q. These periodical estimates for partial and final payment were presented to you for payment? Is that it?

A. Yes, sir.

Q. And was there a resolution passed by the Township Commissioners directing the payment of each of those estimates?

A. Yes.

Q. And whose signature is this?

A. Signature of F. G. Ross, Supervising Engineer.

Q. Mr. Ross' title, then in connection with this project was supervising engineer. Is that right?

[285] A. That is correct.

Q. Your bank account didn't have "PWA" on it, did it?

A. No, sir.

* * * * * * *

CHARLES E. HAAG, a witness produced on behalf of plaintiffs, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

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Mr. Reich:

[290] Q. Now, after you received those partial estimates that you have identified here, what did you do toward payment? How did you pay it?

A. The partial payments were made by check by the School District to the contractors.

Q. Did you have any vouchers?

A. No.

Q. Have you the checks here?

A. Yes, sir.

Q. Will you produce them?

A. (Witness produces checks, which were thereupon marked Plaintiffs' Exhibit No. 213)

Q. Mr. Haag, I show you Plaintiffs' Exhibit 213, and ask you what they are.

A. These are checks issued by the School District

covering payments to the electrical contractor, John W. Craig.

* * * * * * *

CROSS EXAMINATION.

Mr. Eckert:

[291] Q. Mr. Haag, Exhibit 213 consists of the several checks that were issued by the School District of the Township of Kennedy to John W. Craig Electric Company in payment for the electrical work on this new Kenmar School. Is that right?

A. That is right.

Q. Were those checks written by the Secretary of the School Board upon presentment to him of the periodical estimates for partial and final payment, collectively marked Exhibit 210?

A. They were.

Q. This bank account was in the name of the School District of the Township of Kennedy, and had written after it "Charge to Construction Fund." Is that right?

A. It was designated as Construction Fund.

Q. But in the name of the School District of the Township of Kennedy,—

A. That is right.

Q.—Construction Fund. Is that the way it is?

A. That is right.

Q. There was no "PWA" or any docket number on that account?

A. No.

Q. Is that right?

A. That is right.

Q. How much of the time was Mr. Phillips, your architect, on this job?

Mr. Reich: If you know.

A. As near as I can tell, he spent the most of his time on the job.

Q. Did the School District employ anyone besides an architect in connection with this job?

[292] A. They did.

Q. Who was that?

A. We had a man employed as our representative inspector.

Q. How much of the time was he there?

A. He was there all the time.

Q. What did the architect do on the job?

A. The architect's duties were to supervise the construction of this addition to the school building.

Q. How much of the time was the PWA inspector there?

Mr. Reich: If you know.

A. He spent, I would say, from half an hour to possibly two hours a day; possibly more. He had other jobs he was working on—other projects.

Q. Did the architect also prepare the plans and specifications that you have produced?

A. He did.

Q. Was that account in the bank subject to check only by the School District of the Township of Kennedy?

A. It was; that is right.

* * * * * * *

JOHN J. BRUCE, a witness produced on behalf of plaintiffs, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

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Mr. Reich:

[295] Q. Did the Snowden Township receive the grant from the Government for erection of the school?

A. It did.

Q. And what was done with the money?

A. The money was deposited in a separate fund, called the Construction Fund.

[296] Q. And what other moneys were placed in that fund?

A. The moneys from the sale of bonds to help to pay off the building and other necessary funds to complete the cost of the building, which were drawn from our general fund.

Q. Were those bonds purchased by the Government or by private bidders?

A. Private bidders.

Q. Now, after you received those partial estimates, what did you do?

A. They were presented to the Board for approval for payment.

Q. And were they approved and paid for?

A. They were.

Q. By voucher or check?

A. By check.

Q. Have you the checks with you?

A. I have. (Witness produces cancelled checks.)

Q. Were all the moneys due to the electrical contractor paid to him?

A. They were.

(Cancelled checks marked Plaintiffs' Exhibit No. 220)

Q. I show you Plaintiffs' Exhibit 220, and ask you what they are.

A. They are checks made payable to the H. D. Hale Electric Company.

Q. In payment of the partial estimates that you have testified to—that you have identified?

A. That is right.

Q. Were any moneys expended by the School Board out of this construction account for any other purpose except the construction of that school for which the Township received the grant?

A. None.

Q. Did you have a contract between the Township and any architect or any engineer?

A. We did.

* * * * * * *

CROSS EXAMINATION.

Mr. Eckert:

[298] Q. Mr. Bruce, the checks by which the contractor, the H. D. Hale Electric Company, was paid, which checks are marked collectively Exhibit 220, were written by you. Is that right?

A. That is right.

Q. As secretary of the School Board of Snowden Township. Is that right?

A. That is right.

Q. And you wrote those checks upon presentment of the periodical estimates for partial and final payment to the School Board. Is that right?

A. That is right.

Q. And those periodical estimates are marked as Exhibit 219. Is that right?

A. That is right.

Q. In whose name was that bank account?

A. Snowden Township School District.

Q. And was that all?

A. Building Fund.

Q. Snowden Township School District Building Fund. Is that it?

A. That is right.

Q. There was no "PWA" or any docket number in the name of that account?

A. There was not.

Q. And on your checks there was no "PWA" or any docket number? Is that right?

A. There is not.

Q. That account was subject to check only by the Snowden Township School District?

A. That is right.

Q. Mr. Bruce, on one of these periodical estimates there is written in ink, "To the Owner. Liquidated damages have accrued. You may consider assessing of same when making payment." Who wrote that on there?

A. R. B. Blackburn.

Q. Who was he?

A. He was the resident engineer for the PWA.

[299] Q. What did the School District do about that notation, if anything?

A. They didn't do anything about it.

Q. They paid the contractor anyhow. Is that it?

A. That is right. All the contracts were delayed, and they waived any claim against any of them.

Q. What connection did Press C. Dowler have with this work?

A. He was the architect.

Q. And what did he do in connection with this job?

A. He made up the plans and specifications, and supervised the construction.

Q. And, in addition to Mr. Dowler, did the School Board employ anybody else in connection with this job to protect its interests?

A. Only the Clerk of Works, John Simsic.

Q. How much of the time did Mr. Simsic spend on this job?

Mr. Reich: If you know, Mr. Bruce.

A. Well, every day that job worked, presumably.

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RE-CROSS EXAMINATION.

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Mr. Strassburger:

[300] Q. Mr. Bruce, the original estimate was $52,000.00, in round figures. Is that right?

A. I believe that is right.

Q. And you spent $62,000.00?

A. That is right.

Q. And the grant of the Government was based upon the original estimate of $52,000.00?

A. That is right.

Q. You got about $23,000.00?

A. $23,727.00.

Q. So that when the building cost you $10,000.00 more, you got no further funds from the Government?

[301] A. We did not.

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THOMAS HARTLAND, a witness produced on behalf of the plaintiffs, having been duly sworn, testified as follows:

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CROSS EXAMINATION.

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Mr. Strassburger:

[310] Q. Mr. Hartland, under whose supervision was the Homeville School built?

A. The PWA had what is known as a resident engineer on the school, and then the School District had their own inspector.

Q. And whom did the architects, Lamont Button and Paul F. McLean, represent?

A. They represented the School District.

Q. How much of the time were they on the job—they or their representatives?

A. I couldn't just state the amount of time that they were on the job.

Q. Separate contracts were made with the general contractor and with the mechanical contractors. Is that correct?

A. That is correct.

Q. So someone had to coordinate the work. Who did that?

Mr. Margiotti: You mean what work?

Mr. Strassburger: Work on the high school.

Mr. Margiotti: That is objected to, because the contract speaks for itself.

The Court: I take it this question is directed to the physical conditions on the ground.

Mr. Strassburger: That is correct, Your Honor.

The Court: As to the supervisors that were there and who actually gave directions?

Mr. Margiotti: All right,—if you know, Mr. Hartland.

A. Why, the architect, he was—I would say—the general supervisor; and the School District's inspector functioned directly under him.

Q. Did you have an inspector besides that, of your own?

A. Yes, sir.

[311] Q. Who was he?

A. On the—

Q. Just the Homeville School.

A. That was Edward Dorsey Van Sickle—V-a-n S-i-c-k-l-e.

Q. Did he spend a hundred per cent of his time there?

A. Yes.

Q. And he represented the School District?

A. Yes.

* * * * * * *

Mr. Eckert:

[312] Q. Mr. Hartland, nobody could check on that bank account that you refer to except the School District. Is that right?

A. That is right.

* * * * * * *

Q. Who signed the checks by which money was withdrawn from the bank account to which you have referred?

A. The President of the Board of School Directors, the secretary and the treasurer.

Q. You mean the secretary and treasurer of the School Board, of the School District?

A. Of the School District.

* * * * * * *

[313] Q. Who actually wrote the checks in payment to the electrical contractor and the other contractors, too, Mr. Hartland?

Mr. Margiotti: We will admit it was the School District that actually wrote the checks, and they actually signed them. In every case we will admit it was the sponsor that did that.

Mr. Eckert: And that the sponsor did that upon presentment to it of the periodical estimates for partial and final payment. Is that right?

[314] *Mr. Margiotti*: That is part of it; that occurred in each case, but that is not all.

Q. Mr. Hartland, was it to the School District that the partial and final estimates were presented for payment, and did you then write the checks in accordance with those estimates?

A. Yes.

Q. Do you know, Mr. Hartland, the total cost of constructing the three schools that you referred to?

Mr. Margiotti: That is objected to, because I have been confined to one school.

Mr. Eckert: But when it comes to the total grant, it was for all three schools, and I think therefore we have to get the total cost.

Mr. Margiotti: I don't think it is material, if the other two schools are not in it.

The Court: Well, do the offer and acceptance specify the amount for each school?

Mr. Eckert: No they do not, Your Honor; it is a lump sum for all three schools.

Mr. Margiotti:

Q. It covers the whole thing—isn't that right?

A. The offer was a lump sum for all three schools.

The Court: It seems to be a percentage and not an amount in dollars and cents mentioned in the offer.

Mr. Strassburger: It is the same form as the others. It is a percentage, and then says it shall not exceed three hundred fifty-eight thousand dollars, or something like that—the one I looked at read that way.

The Court: It doesn't seem that the total amount is of any importance if the amount under the contract was properly proportioned; it is only in case the amount of the contract were more than the amount specified that the total would be of any evidential importance. We sustain the objection.

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HOWARD H. McCLOSKEY, a witness produced on behalf of the plaintiffs, having been duly sworn, testified as follows:

* * * * * * *

CROSS EXAMINATION.

* * * * * * *

Mr. Eckert:

[323] Q. Mr. McCloskey, to whom were these Forms I-23, entitled "Periodical Estimates for Partial and Final Payment", presented for payment?

A. By whom?

Q. I say, to whom were they presented for payment?

A. I received them.

Q. As secretary of the School Board?

[324] A. That is correct.

* * * * * * *

Q. Please tell us what you did with reference to the payment of these estimates, marked collectively Exhibit 229?

A. We drew the check, had it signed by the president and the secretary of the School Board, and then we mailed it or delivered it to the payee.

Q. And when you say "we" you mean the School District of—

A. Versailles Township.

Q. (Continuing)—of Versailles Township.

A. That is correct.

Q. And did you do that upon receiving these periodical estimates for partial and final payment, marked Exhibit 229?

A. When they were rechecked to see that we agreed with those totals.

Q. By whom was the architect, Mr. Moffitt, hired?

A. By the School District of Versailles Township.

* * * * * * *

HARRY G. CANNING, a witness produced on behalf of the plaintiffs, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

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[341] *The Court*: Well, apparently there is no dispute here over the fact that the contract was made by resolution of the School Board; and from what both of you have said, I think that admission can go on the record. Is that agreed to?

Mr. Strassburger: That is right, that is agreed to.

Mr. Margiotti: Fine.

* * * * * * *

Mr. Margiotti:

[344] Q. Will you state whether or not there was a bank account opened for this construction?

A. There was.

Q. Where was it opened?

A. Mellon National Bank.

Q. And in what name?

A. School District of Borough of West View Building Account.

Q. What funds went into the building account?

A. Well, the U. S. grant—that was forty-five per cent of the amount—and School District funds of fifty-five per cent.

Q. And were these estimates paid out of that fund?

A. They were.

Q. Will you state, Mr. Canning, when was the money actually received from the Government, before or after the contract was signed by the contractor?

A. It was received after the contract was signed.

Q. Did the PWA have anything to do with the bank account?

A. Nothing outside of an audit several times during the period of construction.

Q. Did you pay any amounts out of that bank account except on these estimates?

A. No.

CROSS EXAMINATION.

Mr. Strassburger:

Q. Mr. Canning, these pink papers that are attached to Exhibit 245, those are not checks, are they, in the ordinary sense? They are bills of exchange drawn on the treasurer?

A. Drawn on the treasurer, that is right.

[345] Q. Accepted by the treasurer of the School District?

A. His signature is required.

Q. And payable at the Mellon National Bank?

A. That is right.

Q. In other words, they are not drawn on the account at all; they are drawn on the treasurer. Is that right? They are addressed—

A. Yes, they are addressed to Mr. Young.

Mr. Margiotti: Don't they speak for themselves?

Mr. Strassburger: I want to call attention to the difference.

Q. They are accepted by the treasurer?

A. That is right.

Q. Now, these other forms called periodical estimates for partial payment, they were presented to you, and on the faith of those you issued these warrants or drafts. Is that right?

A. The estimates were presented to me, and I presented them to the Board for approval. Each month they were approved as they were presented to me.

Q. In other words, you had a resolution each month for the payment—

A. Well, it wasn't just a resolution, it was a motion of approval by the Board.

Q. A motion of the School Board?

A. Yes, sir.

* * * * * * *

[346] Q. Who supervised the erection of the additions and alterations of the high school?

* * * * * * *

A. Well, the architect had full charge, and there was a clerk of the works that was on the job that was under his instructions.

Q. Who hired the "clerk of the works"?

A. The architect.

Q. Was he on the job all the time?

A. Yes, sir.

Q. I notice Mr. Margiotti called your attention to certain change orders which were not approved in the

first instance by the PWA. Did you pay those before you had approval by the PWA?

A. Well, there may have been part of it paid as the estimate came in. We were responsible and had authorized the work. They were sent in to PWA for approval, but had not come through yet.

Q. You say you paid some of those, notwithstand- the approval had not come through?

A. That is right; that is, whatever was in on the estimate at that time.

Q. In other words, you have paid this estimate just as it appeared here, in those two or three instances, notwithstanding the fact the approval had not yet come through from the PWA?

A. Yes, sir; because the work had been authorized through the Board and it was necessary.

Q. How was the account in the Mellon National Bank carried—the name of it?

A. Building account.

Q. Well, not just "building account"?

A. Well, School District of the Borough of West View.

Q. When you refer to "the Board", you mean the School Board of West View?

A. School Board of West View, yes, sir.

* * * * * * *

JOHN F. LABOON, recalled on behalf of plaintiffs, testified as follows:

* * * * * * *

CROSS EXAMINATION:

Mr. Strassburger:

[352] Q. In other words, there was no grant made by the PWA particularly for electrical work as such?

* * * * * * *

[353] A. That is correct, excepting the Government, of Course, in making its contribution would not make a

contribution to any part of the work; it made it as a whole; the project had to be complete in every respect before it would make any agreement as to the grant.

* * * * * * *

Q. And as to all of these jobs, who supervised the construction of them?

[354] A. The County.

Mr. Margiotti:

Q. Through the architect?

A. Either through the architect or the Works Department, which ever one was in authority.

Q. And whatever it was, you made your arrangement with PWA on supervision?

A. Well, I don't know whether I understand your question, Mr. Margiotti.

Q. What I mean is this: You see, we have already the contract between the Government and the County—that is the offer and the acceptance, and it refers to provisions and so forth, particularly 230, Form 230—You know what that is, don't you?

A. Yes, I have seen it.

Q. Well, that provides for supervision.

A. That provides for the owner or sponsor providing full supervision.

Q. That is right. You carried out the provisions of your contract?

A. Yes, that is right. We had to supervise it, and we would do it in any case, as a matter of duty to taxpayers.

* * * * * * *

Mr. Strassburger:

[355] Q. Well, take as an example the Municipal Airport. How was that construction work done?

A. All contracts, all County Contracts, are done under the direction and supervision of the Department of Public Works, or the Department of Works, whichever the case may be. For instance, my title indicates—

and I have always in my practice formerly as consulting engineer—we always assume the direction as well as the supervision of a job. May I illustrate this point more clearly? For instance, on Seventh Avenue-Bigelow Boulevard we are starting an overhead construction job which is now in its second week of construction. In that particular instance I directed the contractor not to shut down the boulevard and to fly wild on the north side, so as to keep traffic open until after Christmas. That is a matter of operation. Yet we also have the other phase, of supervision and inspection. That might cover materials, and also the method of construction and the character of the work being done by the contractor. There is a distinction there, for instance, between the supervision that may be given by PWA. The PWA would have nothing to do with the direction of the job; I would have that job, with my subordinates. But they would have their own form of inspection, to be sure that the Government was not cheated out of anything that the contractor might attempt to do contrary to the contract. They saw to it that the contract was fulfilled in every respect; but that was from inspection. But the direction was entirely under me; and we often had conflict between the PWA and myself personally, because PWA at times tried to direct the work beyond their authority, which was after all my responsibility. So have I made it clear just what is meant?

Q. You have made it very clear. That is, what you said as an example about Seventh Avenue I assume applies to these seven jobs that we have in evidence here?

A. Yes, sir, in every respect.

* * * * * * *

WILLIAM T. NORTON, a witness produced on behalf of the plaintiffs, having been duly sworn, testified as follows:

* * * * * * *

CROSS EXAMINATION.

Mr. Strassburger:

[365] Q. Mr. Norton, I notice these warrants contain a notation on the back of each stating that there was a resolution of the Board, and the date of the resolution.

A. Yes, sir.

Q. You had a resolution then of the School Board of the City of McKeesport for each check that you drew to Schindler, the electrical contractor?

A. Yes, sir.

* * * * * * *

[366] Q. When you paid out on these partial estimates, who submitted you the estimates? I refer to these—

A. I-23s?

Q. Yes.

A. They come from the owner's representative; they are handed in by the various contractors, approved by the architect and the regional engineer, and then they come to my office for payment, and they are presented to the Board.

[367] Q. And then the Board would pass a resolution and you would pay it?

A. That is right.

Q. When you talk about the "owner", whom do you mean?

A. The School District.

Q. Were there any changes in the electrical work?

A. No, sir.

Q. When you made these checks to pay these particular estimates for partial payment, did you always have the forty-five per cent from the Government in hand?

A. No, sir.

* * * * * * *

Mr. Strassburger:

[368] Q. Mr. Norton, who actually directed the work?

A. The architect.

Q. And who was the architect?

A. C. R. Moffitt.

Q. Was there a clerk of the works?

A. There was a clerk of works also.

Q. Who furnished the clerk of the works—did you or the architect?

A. The School District.

[369] Q. And paid him?

A. Yes, sir.

Q. You paid him?

A. The School District paid him.

Q. Was there a PWA inspector on the job also?

A. Yes, they had an inspector.

Q. What did he do?

A. Well, he came on the premises at various times to look over the work and see that it was executed in accordance with the requirements of the Public Works Administration.

Q. Was he there all the time?

A. Well, I wasn't on the job. He only came at times, I understand.

Q. Was the clerk of the works on full time?

A. Yes, sir.

Q. Was the architect or his representative there full time?

A. Well, he was supposed to be, and I think he was.

Q. If you know, did the PWA inspector have other jobs to inspect?

A. They so informed me.

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THOMAS HARTLAND, recalled on behalf of plaintiffs, testified as follows:

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CROSS EXAMINATION.

Mr. Strassburger:

[374] Q. Who drew these checks?

A. The secretary of the Board.

Q. That is you?

A. Yes, sir.

Q. And they were signed by officers of the School District?

A. Signed by the secretary and the president and treasurer of the School District.

Q. Could anybody else draw on this account in the Monongahela Trust Company, Homestead?

A. No other person.

[375] Q. And you drew these checks after you received the periodical estimates for partial payments?

A. Yes, sir.

Q. And following each one except the final one you made a check?

A. Yes, sir.

Q. And on the final one you had a check made out and then cancelled it?

A. Yes, sir.

Q. And that final one was exactly ten per cent of the amount of the contract. Is that right?

A. Exactly ten per cent of the amount of the contract.

Q. Were the previous checks each authorized by resolution of the Board?

A. Authorized by motion, the same thing.

Q. In each insance?

A. Yes, sir.

Q. That is the School Board I am talking about.

A. Yes, sir.

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G. L. CRAIG, one of the defendants, produced on behalf of plaintiffs, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

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[392] *The Court*: The witness does not have to testify to anything.

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Mr. Margiotti:

[393] Q. Do you have any record, either from the sponsor or from PWA, showing the completion of the job or the acceptance of it?

A. Yes, I have a record from the sponsor.

Q. Where is that record?

A. Well, I don't think I have it with me, but I can get it. They approved and accepted the job.

* * * * * * *

WALTER R. DRIPPS, recalled for further cross examination testified as follows:

CROSS EXAMINATION.

Mr. Eckert:

[397] Q. When the periodical estimates for partial and final payment were presented to you, as secretary of the Borough of Blawnox, was there a motion of Council passed directing them to be paid or not?

Mr. Margiotti: If there was a motion, of course the motion is the best evidence.

Mr. Eckert: That is what we had the minute book here for, but it isn't here now.

A. Most of them were, but I was authorized by the Borough Council to pay those estimates after approval by Mr. Phillips, the architect for the Borough,

and the resident engineer for PWA. Most of them were ordered paid by resolution, but it wasn't necessary.

Q. Resolution of the Borough Council?

A. Yes, sir.

Q. And was there a resolution of the Borough Council passed at the completion of the work, accepting the building?

A. Yes, sir.

* * * * * * *

Mr. Margiotti: * * * At each of the regular monthly meetings of the Board of Education a [398] motion was made and seconded and unanimously adopted all approved bills be paid by separate warrant from the various accounts. The Board of Education of the Borough of Braddock having advertised and legally entered into a contract with the various contractors to erect a building under PWA, and the I-23s being approved by the architect and resident engineer inspector of PWA, they were recognized as properly O.K.'d bills and duly paid. * * *

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MRS. LENA Z. KENNEY recalled, testified as follows:

DIRECT EXAMINATION.

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Mr. Margiotti:

[417] If you wish to make this short, can't we agree that in every one of these cases there was an offer on the part of the Government and an acceptance on the part of the sponsor in each one of these cases that we have claimed in our complaint. You know that is the case. What is the use of making us get originals and fuss around here for weeks? Do you agree to that?

Mr. Eckert: We will agree to that.

Mr. Margiotti: It is stipulated by and between the parties that in each of the projects enumerated

in the complaint there was an offer from the Federal Emergency Administration of Public Works substantially as already established in the evidence, and an acceptance on the part of the municipality in each case.

Mr. Eckert: This stipulation does not cover the amount of the aid furnished by the Federal Emergency Administration of Public Works to the Municipality.

* * * * * * *

OFFER.

[459] *The Court*: It appearing from the record that at a prior date in the trial the plaintiff made an offer to prove statements of counsel representing each [460] and every defendant in this case in proceedings that were had on indictment against them at No. 10462 Criminal of this court, as to which the defendants had entered a plea of nolo contendere, on the theory that the declarations of an attorney made in the course of that criminal proceeding upon the presentation of the cases of those individual defendants for sentence on a plea of nolo contendere are admissions on the part of their clients which may be offered in evidence in this case; and the Court having withheld its decision upon that offer, and the matter now coming again before the Court, and the same objection having been offered to its admissibility, we sustain the objection and exclude the evidence proposed to be offered.

Mr. Margiotti: Note an exception. And for the record, Your Honor, I would like to amplify my offer: We renew our offer to prove that at No. 10462 Criminal, United States of America v. Hess and Barton, et al, each and every one of the defendants in the instant case, including the corporations, were involved in said proceeding; that the said proceeding

involved a conspiracy to cheat and defraud the Government by false and fraudulent bid rigging and the submission of false claims and certificates to the United States Government, and that the projects involved were the same projects involved in the present proceeding; that the issues were the same, except that in that proceeding it was criminal in nature and this proceeding is civil; * * *

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EARL D. COVELL, a witness produced on behalf of plaintiffs, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

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Mr. Margiotti:

[470] Q. Did you know about the approval of Forms I-23?

A. Yes, sir.

Q. And as the resident engineer inspector, did you approve those forms?

[471] A. Monthly, yes, sir, for each contractor and subcontractor—well, the subcontractors were included in the general contractor.

Q. At the time the forms came to you for approval, will you state whether or not they had the approval of any other person?

A. Before the Government representative approved these estimates they must be approved previously by the owner's representative.

* * * * * * *

[472] Q. Will you state what was the practice with reference to payment of the contractor for the work that he did?

A. The practice that was followed in—I believe I am safe in saying the majority of the cases—near the

end of the month the contractor, the owner's representative and the Government representative would go over the job together and agree on how much work was done during that month and make a pencil memorandum, agree in advance on what would be put on the I-23, the monthly estimate, so called. The contractor would then go back to his office and prepare this I-23 for submission to the owner. Having prearranged the amount and the amount of work, the owner would approve it, turn it over to the Government representative for his approval. He may or may not approve the full amount. If he does not approve the full amount, he writes a non-compliance list at the bottom, which are the exceptions in his approval, and he states if the owner pays in excess of a certain figure he does so at his own risk, and signs his name to that approval and to the list of non-compliance.

Q. When does the contractor get his money?

Mr. Eckert (to witness): If you had anything to do with that.

Q. (Continuing) If you know—on the I-23?

Mr. Eckert:

Q. Did you personally have anything to do with actually paying the contractor?

A. Which question shall I answer, Your Honor?

The Court: Well, Mr. Margiotti is interrogating you.

Mr. Eckert: Well, we object unless it is shown the witness has actual knowledge of the payment.

The Court: I assume the witness is testifying only from his personal knowledge.

[473] *Mr. Eckert*: I just wanted to know whether he had personal knowledge.

Mr. Margiotti:

Q. Do you know when the contractor was paid?

A. In the contract the owner obligates himself to pay the 15th of the following month.

Q. But is the contractor paid after the I-23 is approved by the representative of the PWA?

A. After the resident engineer inspector approves it, he turns it over to the owner's representative for payment.

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[474] MRS. MARY SNYDER, a witness produced on behalf of defendants, having been duly sworn, testified as follows:

Mr. Margiotti: We ask for an offer at Side Bar as to this witness.

Mr. Nicklas (At Side Bar): We propose to prove by this witness, who is the bookkeeper and cost clerk in charge of the records, the original records, of the Fort Pitt Electric Company, the actual costs of the materials and labor that went into the Washington Trade and Concord Schools, and this testimony would be followed by the testimony of an expert who estimated both jobs, who is familiar with the records, who worked on the jobs, and knows the costs of material and labor were necessary and fair and reasonable; this for the purpose of refuting the testimony of Mr. Proctor offered by the plaintiff as to a fair, reasonable low bid on those jobs.

[475] *Mr. Margiotti*: The offer as made is objected to as being generally incompetent, irrelevant, and immaterial.

The Court: That brings up the question of whether or not the actual cost of doing this work may be offered in evidence by the defendants as some basis for the formation of a finding of what would have been a fair, reasonable low bid.

Mr. Margiotti: But before that question is considered shouldn't the witnesses, the expert wit-

nesses, upon what would have been a fair and reasonable cost be first called?

Mr. Strassburger: It is just the reverse.

Mr. Margiotti: Oh, no. I object to that. That is not right.

The Court: The expert witness would have to testify and give his opinion, I take it, from his own knowledge of the electrical contracting business, and not on the cost that might apply to any particular job, which might have its own individual circumstances.

Mr. Strassburger: But they are both admissible in evidence, as Your Honor said, as a sub-basis of what was a fair and reasonable cost. The cases are abundant on that.

The Court: I would like to see your cases.

(Argument by counsel for the respective parties, the jury having been excused.)

(Witness temporarily withdrawn)

* * * * * * *

Mr. Eckert: The defendants offer to prove the actual cost of doing each one of the projects which are left in this suit by competent witnesses who are familiar with what those jobs actually cost.

Mr. Margiotti: The offer as made is objected to for the following reasons: First, it is generally incompetent, irrelevant and immaterial; second, the counsel for the defense in his opening to the jury stated that they would not offer any testimony to deny the bid rigging plan, and in substance stated that the defendants had "fallen into an unfortunate practice"; third, the method proposed is not a full and complete item to be considered in passing on the question of damages.

The Court: We are of the opinion that the correct measure of damage in this case is the difference between the amount of the contract price,

which would be the amount that was originally bid for doing the work on each one of the projects involved in this suit, and what would have been a fair and reasonable low bid had there been no conspiracy between the parties defendant to determine in advance the amount of the bid and selecting the party who was to make the bid. We therefore sustain the objection to this offer of proof.

[476] *Mr. Eckert*: This ruling also applies to the offer made by Mr. Nicklas to prove the actual costs on the Concord School?

The Court: Yes, it applies to those.

Mr. Nicklas: Defendants further offer to prove that the actual costs on the respective jobs were fair and reasonable, as compared with the actual contract prices at which the jobs were let. This for the purpose of denying the allegation of the plaintiff that there was a fraud committed upon the United States, the essence of which action is damages: This testimony being offered for the purpose of denying the allegation of liability.

Mr. Eckert: Along that line, may I add to my offer that we proposed to follow the evidence as to actual cost with evidence that the prices paid to do these jobs were fair and reasonable and the lowest prices at which the jobs could be done.

Mr. Margiotti: We renew our objection, that the offer as made is generally incompetent, irrelevant and immaterial; and state specifically that defendants' counsel in his opening to the jury stated that they would have no defense to the bid rigging plan and said to the jury that the defendants "fell into an unfortunate practice."

Mr. Nicklas: We submit that the record of defense counsel Eugene Strassburger's opening remarks to the jury does not say what Mr. Margiotti has just stated.

The Court: Well, irrespective of whether the remarks of Mr. Strassburger to the jury contained the statement made by Mr. Margiotti, counsel for the plaintiffs, we are still of the opinion that the proof of the actual cost of doing the work is not a proper element upon which damages may be predicated in this case, and therefore we sustain the objection.

Mr. Eckert: We respectfully ask for an exception to the ruling of the Court.

* * * * * * *

JOHN G. BOWMAN, a witness produced on behalf of the defendants, duly sworn.

[478] *Mr. Margiotti*: I ask for an offer of proof, if the Court please.

Mr. Eckert (at side bar): We offer to prove by the witness on the stand that the reputation of Charles W. Ridinger, Sr., one of the defendants, for honesty, fair dealing and integrity, and being a law abiding citizen, is very good.

Mr. Margiotti: The offer is objected to, as being generally incompetent and immaterial, for the reason that the reputation for integrity and being law abiding is not at issue in this proceeding. (Argument on this matter by counsel for both sides, off the record).

The Court: We are of the opinion that the objection to the proof offered should be sustained; and we rest our opinion in this respect upon Helvering against Mitchell, 303 U. S. 391.

Mr. Eckert: I would like to state the offer a little more fully on the record, your Honor. We offer to prove by the witness on the stand that he is Chancellor of the University of Pittsburgh and has been so for some twenty years; that Charles W.

Ridinger, Sr., one of the defendants, is a Trustee of the same University and has been so for many years; that through that and other contacts the witness has become well acquainted with Charles W. Ridinger, Sr.; that the witness knows the acquaintances and associates of the said Charles W. Ridinger, Sr. both in the neighborhood where Charles W. Ridinger, Sr. lives and elsewhere, and also the acquaintances and associates of said Charles W. Ridinger, Sr. in his business activities; that the witness knows the reputation of Charles W. Ridinger, Sr. for honesty, integrity, fair dealing and being a law abiding citizen among those acquaintances and associates of said Charles W. Ridinger, Sr., and that his said reputation is of the very highest.

Mr. Margiotti: Objected to, as being generally incompetent and immaterial, for the reason that the reputation for integrity and being law abiding is not at issue in this proceeding.

The Court: We sustain the objection.

Mr. Strassburger: We offer to prove as to each and every of the defendants in this case, with the exception of Robert C. Carmack, by competent witnesses now in court, the good reputation of each and every defendant except Robert C. Carmack for honesty, fair dealing, integrity and being a law abiding citizen, along the same lines as outlined by Mr. Eckert in his offer as to Charles W. Ridinger, Sr.

Mr. Margiotti: The same objection.

The Court: Sustain the objection.

Mr. Eckert: Will Your Honor please note us an exception?

M. NEIL ANDREWS, a witness produced on behalf of defendants, having been duly sworn, testified as follows:

[479] *Mr. Margiotti*: We ask for an offer at Side Bar.

Mr. Eckert (At Side Bar): We offer to prove by the witness on the stand that he was a special assistant to the Attorney General of the United States in 1939 and 1940, as well as before and since; that as such he was in charge for the Government of the criminal prosecutions against the defendants in this case for the alleged conspiracy in bidding on the electrical work on PWA projects, the same projects that are involved in this suit, and the making of false certificates and affidavits of non-collusion in connection with those projects, which offenses were the subject of the indictments at No. 10462 Criminal to No. 10498 Criminal in this court; that as the representative of the Department of Justice, he agreed with the defendants in this case, who were also defendants in those criminal proceedings, as to the disposition of those criminal proceedings, and that said agreement was that if the defendants would plead nolo contendere to the indictment at No. 10462 Criminal, the Government would be satisfied with whatever punishment the Court imposed in that case as being also in complete satisfaction of all criminal liability of the defendants on all of the indictments, both for the alleged conspiracy and the false certificates and affidavits of non-collusion which were the subject matter of the indictments at No. 10463 Criminal to No. 10498 Criminal, both inclusive; and that, as a matter of convenience, the entire punishment or fines would be imposed at No. 10462, and the indictments at No. 10463 to No. 10498, both inclusive, would be nol. prossed.

Mr. Margiotti: What is the purpose of this?

Mr. Eckert: We submit this in generally competent. The main purpose is to—

Mr. Margiotti: It isn't on the mitigation of damages, is it?

Mr. Eckert: Both. The main purpose is to show that the defendants have already been punished for the same acts upon which a recovery is sought in the present suit, and that, therefore, no recovery for penalties or forfeitures or double damages can be had against them in any other case, and no recovery whatever in this case. Another purpose of this evidence is to mitigate the damages.

Mr. Margiotti: This offer is objected to, as being generally incompetent, irrelevant and immaterial, and having no evidentiary value in any respect in this case.

The Court: We sustain the objection.

Mr. Eckert: Well, will Your Honor hear us?

The Court: Yes. (Informal argument and discussion between Court and counsel, the jury having been excused.)

[480] *The Court*: After hearing the further arguments of counsel, we are of the opinion we have correctly ruled on the objection to the testimony proposed to be offered by Mr. Andrews. The ruling which we have already made will stand.

Mr. Eckert: Will Your Honor note us an exception.

* * * * * * * *

[484] *Mr. Eckert* (at side bar): Defendants offer in evidence the records of this court at No. 10462 Criminal to No. 10498 Criminal, both inclusive, the first being the case of United States of America against William F. Hess et al, and the other indictments being against other defendants in this case as they will appear from the record at each of said respective numbers. This is offered for the purpose

of showing that the defendants cannot be held liable in the instant suit, because they have already been criminally punished for the same offenses and acts which are made the basis for recovery in the present suit; and also for the purpose of mitigating the damages.

Mr. Margiotti: The offer as made is objected to, as being generally incompetent, irrelevant and immaterial, for the purposes for which they are offered.

The Court: We sustain the objection.

Mr. Eckert: We offer the records of this court at the above stated numbers, No. 10462 Criminal to No. 10498 Criminal, both inclusive, in evidence generally.

Mr. Margiotti: The same objection.

The Court: We sustain the objection.

Mr. Eckert: Please note exceptions to the above rulings.

* * * * * * *

[485] (Mr. Margiotti continues address to jury on behalf of plaintiffs, during which objection was made as follows:)

Mr. Margiotti: * * * Members of the jury, according to their own testimony, these defendants each and every one of them went before the criminal court and all pleaded nolo contendere, including Mr. Ridinger, Mr. Bickford and Mr. Yates, and according to their own testimony, their own statements, and according to their own—

Mr. Strassburger: Just a minute. I object to that. We were not permitted to put that in for the purpose of pleading double jeopardy. I don't think it is proper for Mr. Margiotti to comment on it. We stayed scrupulously away from it.

The Court (to counsel for defense): Didn't

you advert to that fact in the course of your argument?

Mr. Strassburger: But afterwards Your Honor ruled that out; you ruled that out of the case.

Mr. Margiotti: But Mr. Eckert referred to it in his argument.

Mr. Eckert: What I argued was, no inference should be drawn from the fact that they appeared in another case and entered a plea of nolo contendere —which is the law; and Mr. Margiotti is doing just the opposite.

Mr. Margiotti: I have a right to argue to this jury that these men went into court on projects involved in this very case, they themselves in that case pleaded nolo contendere, which for the purposes of that case was the equivalent of guilty, for the purpose of punishment, and were fined.

Mr. Eckert: That case was based upon different statutes than the one upon which the present suit is brought, and the law is well settled, I submit, that the plea of nolo contendere cannot be used as a plea or admission of "guilty" in another or subsequent civil suit.

Mr. Margiotti: That is the law. When you bring it out yourself, it is a different proposition.

Mr. Strassburger: No. I said it in my opening and Your Honor ruled it out; and then we did not advert to it, except for the purpose Mr. Eckert stated.

Mr. Margiotti: They can't make a speech and talk on that, without giving me the opportunity to reply and they brought it in the case; and in the opening—

Mr. Strassburger: You would have the right, if the Court hadn't ruled otherwise in the testimony.

Mr. Eckert: We ask to have a juror withdrawn on that account.

[486] *The Court*: We decline the motion to withdraw a juror. Counsel may proceed with his argument. The fact that there was a plea of nolo contendere having been mentioned by counsel for the defendants in the course of their argument, counsel I think may discuss that subject. Possibly he went a little further than he should have gone in the discussion of it, because, as I look at it, there is no inference of liability in this case to be drawn from the mere fact that they entered a plea of nolo contendere in the case that was brought against them in the criminal court. This case has to be decided by the jury upon the evidence that is offered before them in this case. My own view is that the matter ought not to have been adverted to by counsel on either side in the course of their arguments.

Mr. Margiotti (continuing): Therefore, members of the jury, just as the Court has told you, the defense—that is, the same defendants, while that cannot be used as evidence of guilt in this particular case, nevertheless when they were confronted with charges in the criminal court, involving these very projects, the same three men offered no defense, according to the testimony—

Mr. Strassburger: Wait a minute. I object to that. We certainly move now for the withdrawal of a juror. I think, after Your Honor's warning, Mr. Margiotti had no right to make that statement.

Mr. Margiotti: Why not? I am strictly within the Court's ruling.

Mr. Eckert: We ask that Mr. Margiotti's remarks be made a part of the record, and we move for the withdrawal of a juror and continuance of the case, because of that.

The Court: We decline the motion to withdraw a juror. Counsel may continue his argument.

Friday, March 21, 1941,
10:00 A. M.

Oral Charge of the Court.

SCHOONMAKER, J.

Members of the Jury:

This long case is about concluded. You have had a long public service here on this jury, and I hope none of you have been seriously inconvenienced by the fact that you have had to serve on the jury for this great length of time. You have heard the evidence offered by the plaintiffs and the defendants in this case, you have heard the able arguments of counsel on both sides, and the case has now arrived at the point where it is about to be submitted to you for your finding, under the instructions of the Court, which we are now about to give you.

The respective duties of the Court and jury in cases of this kind are these: The Court determines what the law is that is applicable to the case. The jury takes the law as defined by the Court and applies that law to the facts as the [487] jury finds the facts to be. In other words, the jury is the fact-finding body of this court. Where there is a dispute as to the facts of the case, the sole responsibility rests upon the jury to determine what the facts are. We cannot control your judgment in the determination of the facts. Where there is a dispute in testimony between witnesses, upon you rests the sole responsibility of determining which witness is telling the truth. We cannot say to you which witness to believe and which to disbelieve. In determining whether a witness is telling the truth or not, you have a right to consider his interest in the case, if any; you have a right to consider his appearance on the witness stand, his manner of testifying, and the surrounding circumstances under which that testimony is given. However, we may advert to the testimony of witnesses in our charge, and

if we do that we want you to understand that anything we may say about the testimony of witnesses or the facts in this case is a mere expression of opinion on the part of the Court, and it has no binding force or effect upon you whatever, because, as we have already said, the law casts upon the jury the sole responsibility of determining what the actual facts of this case are.

This is an action brought by Morris L. Marcus in the name of the United States against the defendants:

William F. Hess,
John R. Williams,
Thomas G. Hodgdon,
Thomas G. Hodgdon, Jr.,
C. W. Ridinger, Jr.,
C. W. Ridinger, Sr.,
Warren I. Bickford,
Edwin C. Carter,
James V. Burke,
G. L. Craig,
William S. Taczanowsky,
Ralph M. Morganstern,
Max Daniels,
Alvin S. MacNeil,
Walter C. Gloekler,
Robert B. Yates,
H. L. Fullerton,
Robert C. Carmack,
K. K. Wood,
Louis H. Berkman,
Edward B. Sargent, individually and doing business as Sargent Engineering Company,
Robert N. Morris, individually and doing business as Morris Engineering Company,
Charles M. Cronenweth, individually and doing business as Cronenweth Electric Company,
William C. Hemmerle, individually and doing business as W. C. Hemmerle Electric Company,

James C. Devlin, individually and doing business as Devlin Electric Construction Company,

Norman B. Leeke, individually and doing business as Diamond Electric Company,

Herbert D. Hale, individually and doing business as H. D. Hale Electric Company,

James A. Rodden, individually and doing business as Rodden Electric Company,

Richard W. Schindler, individually and doing business as R. W. Schindler Electric Company.

Donald R. Ross, individually and doing business as D. R. Ross Electric Company,

James H. Stauffer, individually and doing business as Stauffer Electric Company,

[488] John W. Craig, individually and doing business as J. W. Craig Electric Company,

R. G. Diodati, individually and doing business as R. G. Diodati & Bro.

Irwin J. Levinson, individually and doing business as Levinson Electric Company,

Bernard A. Ross, individually and doing business as Ross Electric Company,

John E. Hale, individually and doing business as Hale Electric Company,

Walter F. Weberg and J. R. Walter, individually and as partners doing business as Fort Pitt Electric Company,

Winfield S. Martin and Michael J. Murray, individually and as partners, doing business as Martin and Murray,

Benjamin Raphael and Israel Raphael, individually and as partners, doing business as Raphael Electric Company,

Hess and Barton,

Franklin Electric and Construction Company;

Iron City Engineering Company,

Carter Electric Company,

Craig Electric Company,
G. L. Craig Electric Company,
Morganstern Electric Company, Inc.
Daniels Electric Construction Company,
MacNeil Electric Company,
Star Electric and Construction Company,
Industrial Electric Company,
Electrical Contractors Association of Pittsburgh, Inc.,
Lord Electric Company.

The charge is made in this suit that the defendants conspired and agreed together to submit bids on certain construction work on Public Works Administration projects, a portion of the money for which projects was furnished by the United States, at a higher price than would have been bid for doing such work had there been open and fair competition, it being alleged that the defendants did, in pursuance of said conspiracy, actually cause to be submitted as bids on such projects a price higher than the lowest competitive bid prepared by some of the defendants, being an average bid between the highest and the lowest bidders by one of the particular defendants, and did cause to be submitted as an offer to perform such particular work on the projects involved in this case a price that was more than the fair market price for such work and higher than the lowest responsible bid would have been, had there been no conspiracy among the defendants to prevent competitive bidding.

Also, in connection with such bids so submitted by defendants under said alleged conspiracy, the charge is made that the defendants, in bidding pursuant to said plan, submitted a certificate or affidavit that the proposal was genuine and was not sham or collusive or made in the interest or on behalf of any person, firm or corporation not named therein, and to the effect that the person bidding had not directly or indirectly

induced or solicited any other bidder to submit a sham bid, or any other person, firm or corporation to refrain from bidding, and that the bidder had not in any manner sought by collusion to secure for himself an advantage over any other bidder; and that the defendants, in pursuance of the conspiracy, caused other sham bids to be submitted and caused other persons to refrain from bidding, and that the bids submitted on the projects mentioned in the plaintiffs' complaint in this case were false, fraudulent and fictitious, and were made with the intent and for the purpose of defrauding and cheating the United States. And it is alleged that the bids submitted were accepted by the awarding authorities and approved by [489] an agency of the United States Government, and that the claims for the work done and material furnished were based upon such fraudulent contracts, and therefore fraudulent in themselves, and were presented and approved and paid out of moneys of the treasury of the United States.

The False Claim statute of the United States, upon which this action is based is Section 3490 of the Revised Statutes of the United States, which reads partly as follows:

> "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of Section 5438 of the Revised Statutes of the United States, shall forfeit and pay to the United States the sum of $2,000 and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same act."

This action is brought in the name of the United

States by Morris L. Marcus as an informer, under the provisions of a Federal statute which reads:

> "The several District Courts of the United States, the Supreme Court of the District of Columbia, the several District Courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the Judge of the Court and the District Attorney first filed in the case, setting forth their reasons for such consent."

Under the provisions of the Federal statute, the person bringing such suit and prosecuting it to final judgment as an informer is entitled to receive one-half of the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States.

It has been drawn to our attention that some of the jurors have from time to time been taking notes during the progress of the trial. If any juror has made written notes, he should destroy them and not take them into the jury room when you retire to arrive at your verdict in this case, for in arriving at their verdict jurors are to rely upon their memory as to the evidence of witnesses. The written documents, however, that have been offered in evidence you may have before you.

Now, the first question, I would say, for you to consider is whether or not the defendants, or any of them,

were involved in the conspiracy to defraud the United States in the matter of electrical contracts awarded on certain PWA projects in the Western District of Pennsylvania to which the United States appropriated and contributed Federal funds to the extent of forty-five per cent or thirty per cent of the actual cost of the electrical work. In this case there is no dispute, as far as I [490] have been able to see, over the fact that these PWA projects were carried on by municipal corporations, school districts and counties, and that the United States contributed its share or portion of the cost of completing the projects. There has been no dispute over the fact that an application was made to the Federal Government for a grant of Federal money to be used in the construction of these projects, and that plans and specifications were prepared by the local municipality or school district or county and submitted to the Public Works Administration of the Federal Government for approval, and that bids were asked for and received for doing, not only the electrical work, but all the other work involved in the completion of the projects, and that the bids were approved and that the funds that the Government agreed to contribute were paid out in the course of carrying on these projects, with certain exceptions where the money was retained by the Federal Government because of the allegation that fraud had been perpetrated in the matter of bidding on these contracts. In connection with that, a table has been prepared by counsel, which will be submitted to you, as a calculation of the number of projects involved, the amount of the electrical contracts, and their estimate of what would have been a fair cost, and so forth. This will be given to you for your guidance and consideration in connection with the determination of the damages, if any, that might be recovered in this case. So we say to you that, so far as the actual doing of the work that is involved in any

project in this case, there is no dispute over the fact that proposals were invited by the sponsor of each project for public bids upon the electrical work involved in these projects; and that the defendants, or some of them, submitted bids therefor and were awarded contracts for the electrical work upon these projects, fulfilled these contracts, and received payment therefor, thirty or forty-five per cent of which came from the United States, except in the cases to which I have already called your attention, where there has been money held back by the Government because of the discovery or allegation that fraud was involved in the matter of the letting of the contracts. So with that part of the case we think you will have no difficulty, because there is no real dispute about the carrying on of these Federal projects and the doing of the work.

The question in dispute in this case really is this: Was there a conspiracy among the defendants, or some of them, whereby they would agree among themselves as to which defendant was to submit the low bid for a particular project, and which of the other defendants would submit other and higher bids for the same project, thereby intending to control, and actually controlling, the low bid to be submitted, thereby preventing any competitive bidding on any of the projects involved in this suit, and compelling the United States Government to contribute and pay for doing the electrical work on these projects more than the Government would have been required to pay, had there been open and free competition in the open market for doing this electrical work.

Now, that is the first issue of fact for your determination, as I look at it: Was there a conspiracy to defraud in this case, in the matter of bidding, as we have already stated? If there was such a conspiracy, then a fraud was perpetrated upon the Government so far as concerns that portion of the cost of the work on these

electrical contracts which the United States was obligated to pay, to the extent that such cost exceeds the amount that the Government would have been obliged to pay, had there been open and fair competitive bidding.

Now, to guide you in your determination of whether or not a conspiracy existed between the defendants, or some of them, to defraud the Government in securing awards of electrical contracts to a predetermined bidder selected by them in advance, we will define [491] a conspiracy to you as follows:

A conspiracy is a combination of two or more persons by some concerted action to accomplish some unlawful purpose. A formal agreement between the parties is not essential to the formation of a conspiracy; it is sufficient if there is a concerted action of all the parties working together understandingly for the accomplishment of a common purpose. Therefore, the common design being the essence of the charge, it is sufficient that two or more persons in any manner act together for the accomplishment of an unlawful design. It is not necessary to prove that the defendants agreed in terms upon a design to be pursued by common means; but where they pursue the same purpose, with a design to its attainment, the jury may conclude that they were engaged in a conspiracy to effect it. It is not necessary that each conspirator have knowledge of all the details of the common design, nor is it necessary that the conspirators should meet together. If they have a mutual understanding and act through one or more individuals as a consequence of such mutual understanding, the conspiracy is complete. It is indeed not necessary that the conspirators be even acquainted with each other; if they conspire to accomplish the illegal purpose through a common acquaintance or go-between, the conspiracy may be complete. When the existence of an unlawful conspiracy is proved, an act by one of the parties becomes the act of all. A party to a conspiracy is bound

by what his co-conspirators did in furtherance of the accomplishment of the conspiracy. Each member of a conspiracy is responsible for every act of every other member done by common consent in furtherance of the illegal purpose, and also for such acts though not consented to beforehand, if assented to afterwards.

Now, the plaintiffs in this case have the burden of showing by the fair weight of testimony that the defendants were engaged in a conspiracy to defraud the United States, and, in order to establish the fact of that conspiracy, maintain the burden which the law casts upon them, they have produced witnesses here upon the subject of whether or not there was a conspiracy among the defendants, as charged in this case. The principal witness on the subject of conspiracy is the witness Carmack, who is one of the defendants in this case, who has testified to the existence of the conspiracy among the defendants, who are members of the Electrical Contractors Association of Pittsburgh, as to the selection of which of the defendants were to submit bids for the electrical work on the projects involved in this suit. If you believe that Carmack has told the truth as to the alleged bidding plan of the defendants, that would be sufficient evidence on which to base a verdict that the defendants had conspired to defraud the Government in the matter of the contracts for electrical work on the projects involved in this suit. However, we say to you that Carmack admits that he himself was a party to this alleged conspiracy. Therefore, you should scrutinize his testimony carefully, look for corroborating evidence. In that connection, you have before you the fact that in testifying he brought into court his diaries as to the dates of the meetings among the defendants who were to bid on the particular projects, showing the names of the persons who were to bid on those projects; and the plaintiffs have also brought into court those yellow work sheets, where he made a computation as to the prime

costs submitted at the meeting of the persons who were to bid on a particular project, averaged them and determined who was to be the successful bidder on the contract, and giving to others of the defendants represented at such meeting on that particular project the amounts, not only that the low bidder was to get but as to the amounts that these other defendants were to bid, in order to show that there was in fact competitive [492] bidding on the project. And on the subject of whether or not Carmack's verbal testimony is corroborated in court, you have the records of the Electrical Contractors Association, the records of its meetings, the records of the papers that were found in the Electrical Contractors Association's office and produced in court here, which you might find would corroborate the testimony of Carmack. However, we say to you that, even without corroborating evidence, if you believe the testimony of Carmack, that would be sufficient evidence upon which to base a verdict for the plaintiffs in this case. And, in this connection, we invite your attention to the fact that no witness has taken the stand to deny the existence of a conspiracy nor the participation of the defendants therein.

If you find that a conspiracy exists as charged, then you will have to determine which of the defendants were parties to that conspiracy. If you find that none of the defendants were involved in the conspiracy charged in this case, then you would return a verdict in favor of the defendants. If, on the other hand, you find that a conspiracy, as charged, exists in this case, you would return a verdict in favor of the plaintiffs and against the defendants involved therein for such amounts of damage and penalty as you would find from the evidence in this case that the plaintiffs would be entitled to, computed according to the measure of damage which I shall now give you.

The damage to which the plaintiffs would be entitled would be measured by the difference between the contract price paid the contractor therefor in excess of the amount which the United States would have been obliged to pay for the same work, had there been open, competitive and uncontrolled bidding.

To support the claim of the plaintiffs that the United States has suffered damages through the alleged bidding conspiracy of the defendants, the plaintiffs have offered the testimony of the witness Proctor, who has testified to his experience in the electrical business, to his experience in estimating the cost of electrical work, and to his estimates of a fair competitive low bid for doing the electrical work involved in these several projects to which the United States contributed a share. And on this subject of what a fair competitive low bid would have been for these several projects, the defendants have submitted the testimony of Loughridge and other witnesses, some of whom testified that they actually estimated the work on which the bids were submitted, being estimators in the employ of one or more of the defendants; and these witnesses have testified as to what would have been a fair and reasonable low bid for the projects involved in this suit. And, as I recall it, the testimony offered by the defendants, as to all of the projects that are involved in this suit, the estimate of what would have been a fair low competitive bid in the open market was either the bid figure that was actually submitted or a sum greater than the bid figure that was actually submitted. I do not recall of any case where the testimony offered by the defendants shows that there was an estimate submitted that was less than the amount of the contract price or the bid upon which the contract was originally awarded. However, that is a matter for your consideration; do not rely on my memory in regard to that, because you are the ones who have to determine what the actual

facts are from the testimony of witnesses, and from the testimony of all the witnesses in this case, upon the subject of what would have been a fair bid as well as all other disputed issues of fact; it is for you to say as to what would have been a fair and reasonable low bid for doing the electrical work on the projects involved in this suit. You will make your own computation of actual damage, if any, suffered by the United States by reason of the alleged [493] conspiracy to prevent open and fair bidding,—if you find, of course, that a conspiracy exists and that a fraud has been committed upon the United States.

Now, in computing the actual damage that was suffered on a particular project or particular instance, you would take the contract price for each of the PWA projects as to which testimony was introduced in this case, and then determine what you find to be a fair and reasonable low bid for doing the electrical work on that particular project, had there been fair and open competitive bidding. If that fair and reasonable low bid is lower in amount than the price for which the contract was awarded, the difference between the contract price and the fair and reasonable low bid would be the measure of actual damage suffered by the United States as to that particular project. Then the sum total of the actual damages would make up the total actual damages suffered by the United States. This amount you would then double to arrive at the damages which would have accrued to the United States by reason of the conspiracy to present false claims against the United States.

The particular projects in which there has been evidence that a fair and reasonable low bid is less than the contract price are these—all of them Pennsylvania projects:

1908-F—Miller Elementary School;

1617-F—Arsenal Elementary School;

1303-R—Washington Trade School;
1173-D—Prospect Junior High School;
1302-R—Burgwin Elementary School;
1688-F—Schiller Elementary School;
1150-R—Carmalt Elementary School;
1907-F—South Vocational High School;
2016-F—Spring Garden Elementary School;
1317-R—Banksville Elementary School;
1156 —Spring Hill Elementary School;
1687-F—Concord Elementary School;
1618-F—Crescent Elementary School;
1299-R—Perry Athletic Field House;
7501 —Juvenile Court;
4242 —County Home, Woodville;
7000-R—Municipal Airport, A, B, C, D, E;
7000-R—Municipal Airport, F;
7000 —North Park Bath House;
9616 —North Park Boat House;
1920 F—West View High School;
1069 —Hampton School Additions;
1144 —North Fayette High School;
1692-D—Braddock Junior High School;
1130 —Westinghouse Memorial High School;
1392 —Kenmar School;
1458 —Edwin Markham School;
1703-DS—Crafton Municipal Building;
1456 —Lincoln School Building;
1575 —Filtration Plant, Braddock;
2224-F—Shaler Township Softening Plant;
1546 —Library School;
1977-F—Siebert School;
1189 —School Building at Chalfant;
1633-F—Cowley-Goettman Playground;
1600-F—Sophia Evert No. 4 Playground;
1600-F—Schenley Park Comfort Station;
1600-F—Garfield Playground Field House;
1600-F—Townsend Playground Field House;

1600-F—Larimer Playground Field House;
[494]
1600-F—Armstrong Playground Field House;
1633 —McGee Playground;
1987 —West Penn Playground;
2208 —Homewood, etc. Filter Houses;
1600-F—Sophia Evert No. 1 Field House;
1600-F—McKinley Park Field House;
2208 —Schenley, etc. Filter Houses;
1634 —Burgwin Playground.

In addition to that, if the United States is entitled to recover by reason of the fact that you have found that a conspiracy exists among the defendants to present false claims against the United States, the United States is entitled to recover under this False Claim statute a penalty of $2,000 for each project in which there has been collusive bidding. The projects to which this penalty might be applicable are those we have just listed as projects on which evidence has been offered that a fair and reasonable low bid is less than the contract price, and also the following projects, on which there is evidence of collusive bidding but no evidence of any actual damage suffered, namely:

Pa. 1689-F—Whittier Elementary School;
Pa. 1695-F—Blawnox Municipal Building;
Pa. 1935-F—East End Elementary School;
Pa. 1975-F—Homeville School;
Pa. 2017-F—West Liberty School;
Pa. 2019-F—Girls Vocational School;
Pa. 2023-F—East Ohio Grade Crossing;
Pa. 2976 —Jerome Street Bridge.

The total number of the projects to which the jury finds this penalty to be applicable multiplied by $2,000 would make the total amount of the penalties recoverable in this case.

[495] If you return a verdict in favor of the plaintiffs, you would add together the total amount of damages you find that the plaintiffs have suffered, doubled, and the total amount of penalties allowed by you, and bring in a verdict in one lump sum. In making up the computation of such actual damages suffered by the United States, you will bear in mind that the United States was to contribute forty-five per cent of some of the projects and thirty per cent of the others; so that, in making up a computation of the actual damages suffered by the United States, you would take forty-five per cent or thirty per cent of the actual damage, if any, which you would find to have resulted from the conspiracy of the defendants, taking only forty-five per cent of the actual damages in the cases where the United States contributed forty-five per cent of the electrical cost, and taking only thirty per cent of the actual damage in the cases where the United States has contributed thirty per cent of the cost. Then from that amount you would deduct any funds retained by the United States out of its share of this computation. There was evidence, as I recall it, that the United States in some of the cases retained certain sums of money on account of an allegation having been made that there was collusive bidding on the projects, and the Government, when it was apprised of that contention, paid no further money on such projects.

And in connection with the Government's portion of furnishing the money to complete these projects, we say to you that it is of no importance that the money paid out to the electrical contractors on the projects involved in this case was paid through the agency of the Municipal Corporation, School District, County, or other agency of the State of Pennsylvania. In our view, the money to be expended as the share of the United States on these projects was ear-marked as Federal funds. All these projects carried on with money derived from the

Federal Government had to be approved by the Federal Administrator. The diversion of these funds to the project to which they were assigned was a diversion of Government money.

If you find a verdict in favor of the plaintiffs in this case, your verdict might properly be worded somewhat as follows: "We find a verdict in favor of the plaintiffs for (blank) dollars"—naming the total amount of your damages and penalties against the defendants you find to be parties to the conspiracy to defraud. If you find a verdict against all of the defendants, you need not mention them by name, but it would be sufficient for you merely to say, "We find a verdict for the sum of (blank) dollars against all the defendants". If, on the other hand, you find a verdict in favor of all of the defendants, you would merely return a verdict as follows: "We find a verdict in favor of the defendants". If you find a verdict in favor of the plaintiffs against some of the defendants, you would name the defendants against whom you find that verdict, and then say as to such defendants in whose favor you desire to return a verdict, "We find a verdict in favor of the defendants (naming them)".

The plaintiffs have prepared and submitted to the Court a computation or calculation of their claimed damages. We are going to let this sheet go out to you, not as evidence that the plaintiffs are entitled to this amount of money, but as a mere calculation of the money that the plaintiffs claim they are [496] entitled to on account of the damages. This tabulation shows the contract price, the plaintiffs' contention as to what a fair and reasonable competitive low bid would have been, and the plaintiffs' contention as to what the total amount of actual damage suffered was, the percentage of the Government grant—whether it is thirty per cent or forty-five per cent—and then the actual claim of the United States for damages suffered on a particular project. That would be arrived at by taking forty-five

per cent or thirty per cent of the actual damage which the plaintiffs claim they have shown by the proof in this case, and then the doubling of that amount, under the statute, would give you the actual amount of damage claimed by the plaintiffs in the case. Bear in mind always that this paper of itself is not evidence that the damages were suffered that are shown on this sheet; it is merely the plaintiffs' calculation of what the plaintiffs contend that the evidence in this case discloses.

In addition to that, the plaintiffs have submitted for your convenience a tabulation of the projects involved in this suit to which they contend that the penalty is attached. This also is a mere calculation, and is for your convenience and use in the consideration of this case. It has no binding force and effect upon you. You are to find the cases to which the penalty attaches, and if you do not agree with this calculation you can make up your own.

The defendants also have submitted for your consideration their computation. In this they give the name of the project, they give the percentage of the PWA grant, they give the name of the contractor, they give the amount of the contract price, they give the amount of Loughridge's estimate, and then they show on the last column the amount withheld by the Government—that is, the various amounts to which I called your attention, that in some instances there were certain amounts withheld. This also is a mere calculation and has no evidential force, because you are to determine, if you find that a conspiracy exists, whether or not the Government has been damaged and what the amount of that damage is.

Both the plaintiffs and the defendants in this case have submitted to the Court certain points for charge. These points we refuse, except in the following instances where we affirm them—we will not read the points which we refuse:

Defendants' Point No. 5:

"No inference against the defendants may be drawn from the fact that they refused to testify because in so doing they were merely exercising a right which the United States Constitution gives them."

That point is affirmed. But we say to you, in connection with that, it would have a bearing upon whether or not there was any evidence that would refute the testimony of Carmack, for instance, when no witnesses have taken the stand to deny this testimony; that would be a fact for your consideration.

Defendants' Point No. 6:

"In no event would the Federal Government be entitled to the whole of the difference between what the contract was let at and Proctor's estimate, but [497] only to thirty per cent or forty-five per cent of such alleged damages, depending on the percentage which the Government agreed to grant on each respective project."

We affirm that point; we have already so stated.

Defendants' Point No. 27:

"If the jury should find in favor of the plaintiffs, from any damages which may be found on account of the Concord Elementary School project there should be deducted the sum of $1500.00 withheld by the Government on account of the electrical contract on that project."

We affirm that point; that is what we have already said to you.

Defendant's Point No. 28:

"If the jury should find in favor of the plaintiffs, from any damages which may be found due on account of the Schiller Elementary School project there should be deducted the sum of $2,000 with-

held by the Government on account of the electrical contract on that project."

We affirm that point.

Defendants' Point No. 29:

"If the jury find in favor of the plaintiffs, from any damages which may be found on account of the South Vocational High School there should be deducted the sum of $4913.01 withheld by the Government on account of the electrical contract on that project."

We affirm that point.

Defendants' Point No. 30:

"If the jury should find in favor of the plaintiffs, from any damages which may be found on account of the Arensal Elementary School project, there should be deducted the sum of $2500 withheld by the Government on account of the electrical contract on that project."

That point is affirmed.

Defendants' Point 31:

"If the jury should find in favor of the plaintiffs, from any damages which may be found to be due on account of the Braddock Junior High School project there should be deducted the sum of $2446.61 withheld by the Government on account of the electrical contract on that project."

That point is affirmed.

[498] I would like to inquire now whether counsel desire me to charge on any further points that we may have omitted from our charge. You may state in open court what you want.

Mr. Eckert: I request that the Court state to the jury that the following defendants made no certificates or affidavits of non-collusion whatever: C.

W. Ridinger, Sr., C. W. Ridinger, Jr., Warren I. Bickford, and the Iron City Engineering Company.

The Court: We are unable to say whether that is so or not. The jury will have the evidence before them, and they can determine whether those particular defendants did or did not. We do say, however, that whether they did or whether they did not make certificates or affidavits of non-collusion, that fact would not excuse them from liability in this case, if they were parties to the conspiracy to defraud.

Mr. Margiotti: I just noticed one matter that I would like to call to the Court's attention. In making the charge as to what the Government would be entitled to receive, when he gave the calculation there would be the difference between the contract price and what they would find to be a reasonable low bid, or what they would have been required to pay if there had been competitive bidding, he said that would be the amount suffered by the Government and then in the end it would be doubled; in that instance the Court did not state it would be either forty-five per cent or thirty per cent of that damage, but the Court did state it later, and the Court affirmed the point, so he corrected it. I am just calling it to the attention of the Court now, so there cannot be any—

The Court: There is no question about that. The Government would only be entitled to recover thirty or forty-five per cent of the actual damages.

Mr. Margiotti: And on this calculation of the defendants, at the bottom they have a notation. It says: "(Asterisk) $1,000 withheld by PWA on these jobs." Now, that $1,000 withheld, with five asterisks there and two at the bottom, that means $1,000 altogether and it does not mean seven; it might be misunderstood.

Mr. Eckert: We have added that on there.

Mr. Strassburger: There is one thing further. Your Honor called attention to the fact that Mr. Carmack was not contradicted—in what respects he was not contradicted, and I think Your Honor, perhaps inadvertently, forgot to mention the fact that he was contradicted by a large number of witnesses who came from supply houses, bonding company, and so forth. And another thing that Your Honor has not called to the attention of the jury, that the witnesses who testified for the defendants as to fair and reasonable costs of particular items of equipment, in addition to t[illegible] estimators, were also representatives of the va[illegible]us supply houses.

[499] *The Court*: Yes, there was testimony offered by the witnesses for the defendants as to particular items that appear on the estimate of Proctor as to the fair prices on those. Those, of course, are for the consideration of the jury. And in connection with whether or not the testimony of defendants' witnesses in fact contradicted Carmack, to which counsel has now called my attention, we say that is a matter exclusively for the jury, and they have a right to consider that testimony, as well as any other testimony in the case which would contradict or tend to contradict Carmack, if it does so.

Mr. Nicklas: Your Honor—inadvertently, I believe on two occasions stated that this suit was brought by Morris L. Marcus on behalf of the United States, but you failed to mention the fact that the suit is also brought in his own right, and the pleadings show that.

The Court: However it may be, the foundation of the suit is the Federal statute. It is the suit of the United States on relation of the individual plaintiff, Morris L. Marcus; and, of course, he is interested in the suit, because he is entitled to half of

anything that may be recovered, if anything is recovered, and he has to pay the costs of the litigation.

Mr. Margiotti: If Your Honor please, there is just one matter I would like to discuss now, and that is all these exhibits. My impression on the exhibits is they ought to all go out with the jury—I think that is Mr. Eckert's, too. I was going to suggest this, that we give to the jury our respective calculations, and then if the jury wants the exhibits we send them out to them, rather than bundle them up and send them all up now.

The Court: Of course, there must be a differentiation there. If you were to say exhibits that have been offered in evidence; those that have been merely marked for identification—

Mr. Margiotti: I mean those that are actually offered in evidence, and part of the evidence.

The Court: That is true. There is no need to clutter up the jury room with all of these exhibits. If the jury themselves actually want any of them, they can send word by bailiff, and counsel will be here to produce them.

Mr. Margiotti: Then another thing, Your Honor,—you said yesterday when there was some objection made to my argument that Proctor's estimates would be in the hands of the jury. Of course, if the exhibits do go out, I would like to have the estimates go out, and, of course, their estimates—

[500] *The Court*: There was only one of those estimates of Proctor that was admitted in evidence, as I recall it.

Mr. Margiotti: They were all admitted, Your Honor, but there was only one of them shown to the jury, and that was shown by Mr. Burke, as I recall it. And then I tried to show the rest, and there was an objection.

The Court: If you want the one that Mr. Burke showed to go out with the jury, that is all right.

Mr. Eckert: We had some estimates too, Your Honor.

Mr. Nicklas: We had some of Mr. Johnston's that were shown to the jury by Mr. Margiotti, which should go out, on the Concord School job.

Mr. Margiotti: That is right. That was on the question of the erasures, and so forth.

The Court: Counsel may come to side bar. (At side bar) And now, at side bar, the Court inquires of counsel whether they desire to note exceptions to the charge, or any part thereof?

Mr. Eckert: The defendants except specially and specifically to the refusal of such of their points as were refused.

The defendants also specifically and specially except to the learned Court's comment made in conjunction with its affirmance of the defendants' point for charge numbered 5.

The defendants also specifically except to the portion of the charge wherein the Court purported to define to the jury the first question they have to decide, substantially in this language: "Now, the first question is whether or not the defendants, or any of them, were involved in a conspiracy to defraud the United States in the matter of electrical contracts awarded on certain PWA projects", for the reason that such statement of the question is not in accordance with the statute upon which this suit is brought. Section 3490 of the Revised Statutes, upon which this suit is brought, incorporates Section 5438 of the Revised Statutes, which does not make a basis for recovery the defrauding of the United States but the presentment for payment or

approval of a false claim upon or against the United States on the latter's own liability to the claimant. What Section 5438 provides is more fully shown by said section of the Revised Statutes itself, to which reference is hereby made for this purpose.

We also respectfully except to the portion of the charge relating to the measure of burden of proof [501] upon the plaintiffs in this case, on the ground it is not by mere preponderance of the evidence, but by evidence which satisfies the jury beyond a reasonable doubt.

The Court: You have already presented a point on that subject. Your legal question is properly taken care of by that.

Mr. Eckert: The Court—inadvertently, I believe—said that the defendants' evidence in no instance was that a fair and reasonable low bid in open competition would have been lower than the amount at which the respective contract was actually let. In fact, in several instances the defendants' evidence, consisting of the testimony of Mr. Loughridge, was that a fair and reasonable low bid in open competition would have been somewhat less than the contract price.

The defendants also specifically except to the Court's inclusion of the County Home job at Woodville as one which may have been awarded according to the alleged bidding plan, which consisted of averaging bids. There is no evidence in this case to show that the County Home at Woodville was handled in accordance with any such bidding plan, but that, if any improper action was taken by anybody with respect to the bidding on that project, it was the individual action of a few persons, and not part of the conspiracy upon which the present suit is based.

The defendants also specifically except to the

portion of the charge to the effect that a $2,000 penalty or forfeiture may be recovered for each project which the jury could find was handled in accordance with the alleged conspiracy. We submit that only one $2,000 penalty or forfeiture could be included in the jury's verdict in this case, regardless of the number of projects that the jury may find were handled in accordance with the bidding plan which is the basis of the alleged conspiracy.

We also except to the charge of the Court, as we understood it, that $2,000 as a penalty or forfeiture could be collected and should be awarded by the jury on both the first and second list of projects which the Court enumerated in its charge. As I understood Your Honor, Your Honor made a flat statement that the jury should allow $2,000 on each project, whereas, of course, it would only be, in any event, an allowance of $2,000 on each project that the jury found was handled in accordance with any—

The Court: Well, the whole purport of my charge was that; it could not be understood any other way.

Mr. Eckert: And we also specifically except to the portion of the charge in which the Court stated that it made no difference that the Government funds were paid by the PWA to the local municipality and paid by the latter, sometimes called the sponsor, to the [502] electrical contractor. We submit that there has been no violation of Section 5438 of the Revised Statutes, which is incorporated into the Informer's Act, upon which this suit is brought, because the defendants presented no false claims for payment from the United States Government, their right to look for pay-

ment being limited to the local municipalities, with which alone they contracted.

Mr. Strassburger: The defendants specially except to that portion of the charge in which the Court directed the jury to double the damages, if the jury found in favor of the plaintiff. We contend that the doubling of the damages is a matter of discretion with the jury.

Mr. Nicklas: Defendants specially except to that portion of the charge wherein the Court stated, in substance, that "If you believe the testimony of the witness Carmack, even with no corroborating evidence, his testimony alone would be sufficient to warrant your finding for the plaintiff". I don't think that is correct.

Mr. Margiotti: The plaintiffs except to the Court's refusal of its one point, and to the Court's affirmance of defendants' point No. 5. (Further informal discussion).

Mr. Strassburger: The defendants except to the unfavorable prominence given in the charge of the Court to the corroboration of Mr. Carmack, such as referring to the work sheets, diaries, et-cetera, whereas the Court did not refer in its charge to any of the evidence which was produced by the defendants in reference to numerous matters which did contradict Mr. Carmack.

The Court: Members of the jury, I have heard counsel with reference to their exceptions to my charge, and I have decided to affirm without qualification the defendants' fifth point, which reads as follows:

"No inference against the defendants may be drawn from the fact that they refused to testify, because in so doing they are merely exercising a right which the United States Constitution gives them."

Are there any other matters now to be brought to the attention of the Court? (No response).

Members of the jury, I have had the Clerk prepare a verdict sheet, which gives you the names of all the defendants who are involved in this case, as well as the plaintiffs. The form you will have to write yourselves, but there is plenty of room here for you to do it.

(Jury retires).

PWA Form No. 230

Plaintiffs' Exhibit 22.

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS
Harold L. Ickes, Administrator.

TERMS AND CONDITIONS

SEPTEMBER 15, 1937.

PART I—GENERAL TERMS AND CONDITIONS.

1. PREREQUISITES TO GOVERNMENT'S OBLIGATION.—The United States of America (hereinafter referred to as the "Government") shall be under no obligation to the applicant to whom the offer is made (hereinafter referred to as the "Applicant") to take up and pay for any obligations which it offers to purchase (hereinafter referred to as the "Bonds") or to make any grant:

(a) Representations.—If any representation made by the Applicant in its application or in any supplement thereto or amendment thereof, or in any document submitted to the Government by the Applicant, shall be incorrect or incomplete in any material respect;

(b) Financial Condition.—If, in case the Government has offered to purchase Bonds, the financial condi-

tion of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government;

(c) Cost of Project.—If it appears that the Applicant will not be able to complete the project described in the Government's offer (hereinafter referred to as the "Project") for the sum allotted by the Government, or that the Applicant will not be able to obtain funds necessary to complete the Project;

(d) Legal Matters.—If, in case the Government has offered to purchase Bonds, the bond transcript shall not show that such Bonds are binding and legal obligations; and if, in all cases, proper disposition shall not have been made of all legal questions affecting the application for a loan or grant or both, the Project, and the construction thereof;

* * * * * * *

(h) Undue Delay.—If the Applicant shall delay for an unreasonable time acceptance of the offer from the Government to aid in financing the construction of a Project by a loan and grant, grant only, or loan only (hereinafter referred to as the "Offer") or performance of any of the duties or obligations to be performed by it under the Offer and the terms and conditions;

(i) Compliance.—If the Applicant shall not have complied with all the provisions contained or referred to in the Offer and the terms and conditions theretofore to be complied with by the Applicant;

(j) Plans and Specifications and Certificate of Purposes.—If the Applicant shall not have filed with the Government plans and specifications for the Project, and a certificate or certificates of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate or certificates of purposes as showing that the Project will be

constructed in a sound, economical, and efficient manner so as to provide reasonable security for the loan to be made by the Government (in case the Government has offered to purchase Bonds) and so as to comply in all respects with all applicable Federal Statutes, the Offer, and the terms and conditions;

(k) Architectural or Engineering Supervision and Inspection.—If the Applicant shall not provide and maintain competent and adequate architectural or engineering supervision and inspection of the construction of the Project.

2. EXPENSES.—The Government will be under no obligation to pay any costs, charges, and expenses incident to compliance with any of the duties or obligations of the Applicant.

* * * * * * *

4. BONUS OR COMMISSION.—The Applicant will not pay any bonus or commission for the purpose of obtaining an approval of the application for a loan or grant.

* * * * * * *

9. OTHER FINANCIAL AID FROM THE GOVERNMENT.—If the Applicant shall receive any funds (other than those received under the terms of the Offer), directly or indirectly, from the Government, or any agency or instrumentality thereof, to aid in financing the construction of the Project, to the extent that such funds are so received the grant will be reduced, and in case the Government has offered to purchase Bonds, to the extent that such funds so received exceed the grant set forth in the Offer, the aggregate principal amount of Bonds to be purchased by the Government will be reduced.

10. EXPENSES PRIOR TO OFFER.—The Government assumes no obligation to pay any grant on any portion of the Project on which costs have been incurred by the Applicant prior to the date of the Offer, regardless of whether or not the Applicant, at the time of incurring such costs, relied on the possibility of a grant being

subsequently obtained from the Government to aid in financing the Project. If reimbursement for such costs is requested by the Applicant in its certificate of purposes, such costs will be explained in detail.

11. STATE OR TERRITORIAL LAW.—Anything in the Offer or the terms and conditions to the contrary notwithstanding, nothing herein shall require the Applicant to observe or enforce compliance with any provision hereof, perform any other act or do any other thing in contravention of any applicable State or Territorial law: *Provided,* That if any of the provisions of the Offer or the terms and conditions violates any State or Territorial law, or if compliance with the provisions of the Offer or the terms and conditions would require the Applicant to violate any State or Territorial law, or if because of any other reason the Applicant cannot comply with any of such provisions, the Applicant will at once notify the Administrator in writing in order that appropriate changes and modifications may be made by the Administrator and the Applicant to the end that *the Applicant may proceed* as soon as possible *with the construction of the Project.*

PART II—GRANT AND BOND PAYMENTS TERMS AND CONDITIONS.

1. ADVANCE GRANT.—At any time after the acceptance by the Applicant of the Offer, the Applicant may request an advance on account of the grant in an amount not exceeding 15 per cent of the previously approved estimated cost of the Project. This advance grant may be used for paying architectural, engineering, and planning fees, costs of surveys, borings, and other preliminary investigations, costs of preparation of plans, specifications, and other forms of proposed contract documents, costs of advertisements for bids for contracts, construction costs, and the printing of the Bonds. Such advance grant will not be used in payment of legal fees

or of the costs of acquisition of lands, easements, or rights-of-way. The request for this advance grant must be accompanied by a signed certificate of purposes in which must appear in reasonable detail the purposes for which such advance grant will be used. If the Project, to aid in the financing of which the Government has made an advance grant, is abandoned, the unused advance grant proceeds will be returned to the Government, but nothing herein shall be construed to waive any right which the Government may have to the return of the entire advance grant if the Applicant shall have acted in bad faith or made any misrepresentations concerning the completion of the Project or the use of the advance grant.

* * * * * * *

3. INTERMEDIATE GRANT REQUISITIONS.—*(a) Loans and Grants.*—In case the Government is to purchase Bonds, simultaneously with the delivery of the Bonds to and payment for the Bonds by the Government, or where Bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, or at any subsequent time, if the Applicant has filed a requisition and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between any advance grant previously made and an amount equal to 25 per cent of said previously approved estimated cost of the Project. When the Project shall be approximately 70 per cent completed, as determined by the Administrator, the Government will honor a requisition for a second intermediate grant in an amount equal to the difference between the aggregate amount of grant payments theretofore made and 35 per cent of said previously approved

estimated cost of the Project. To the end that payment of such second intermediate grant requisition may be expedited, the Applicant may file such requisition when the Project is approximately 50 per cent completed.

No intermediate grant requisition will be honored if the Applicant shall not have deposited in the Construction Account (hereinafter described) such sums as may have been required in the Offer to be so deposited in addition to the funds made or to be made available by the Government.

(b) Grants Only.—In case the Government is to make a grant only, at any time after the Applicant has deposited in the Construction Account its share of the cost of the Project (herein called "Applicant's Funds"), if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes in which appear in reasonable detail the purposes for which the funds will be used, the Government will make a grant of an amount representing the difference between the advance grant, if any, and an amount equal to 25 per cent of said previously approved estimated cost of the Project. When the Project shall be approximately 50 per cent completed the Applicant may file its second intermediate grant requisition for an amount equal to the difference between the aggregate amount of grant payments theretofore made and 35 per cent of said previously approved estimated cost of the Project, but said second intermediate grant requisition will not be honored until the Project is approximately 70 per cent completed, as determined by the Administrator.

(c) In General.—Intermediate grant requisitions in all cases will be honored only if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of the Offer and the terms and conditions.

4. FINAL GRANT PAYMENT.—At any time after the completion of the Project, the Applicant may file a re-

quisition requesting a final grant payment which, together with all previous payments on account of such grant, shall be an amount not in excess of 45 per cent of the actual cost of the Project, *as determined by the Administrator,* but not to exceed, in any event, the amount of the grant set forth in the Offer. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the Offer and the terms and conditions.

In the determination of the final grant payment, costs or charges of a continuing nature not incurred by the Applicant specifically for the Project will not be allowed.

5. CONSTRUCTION ACCOUNT.—A separate account or accounts (herein collectively referred to as the "Construction Account") will be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation. The advance grant payment, the intermediate grant payments, the proceeds from the sale of the Bonds (exclusive of accured interest), Applicant's Funds, the final grant payment and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the Project will be deposited in the Construction Account promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of any Bonds will be paid into a separate account (herein referred to as the "Bond Fund"). Payments for the construction of the Project will be made only from the Construction Account.

6. DISBURSEMENT OF MONEYS IN CONSTRUCTON ACCOUNT.—Moneys in the Construction Account will be expended only for such purposes as shall have been previously specified in a signed certificate of purposes filed with and accepted by the Government. After all costs incurred in connection with the Project have been paid, if any Bonds are then held by the Government, all

moneys remaining in the Construction Account will be used to repurchase Bonds or will be transferred to the Bond Fund.

7. USE OF MONEYS IN BOND FUND.—Moneys in the Bond Fund will be expended solely for the purpose of paying interest on and principal of Bonds.

PART III.—CHANGE FROM LOAN AND GRANT TO GRANT ONLY.

1. TERMS AND CONDITIONS APPLICABLE TO LOANS AND GRANTS AND GRANTS ONLY.—*(a)* The terms and conditions are applicable in cases where the Government has offered to make a loan and a grant or to make a grant only or to make a loan only. If the Offer is for a loan only, the provisions of the terms and conditions relating to grants shall have no application.

(b) If, after the Applicant has accepted the Offer to make a loan and a grant, the Applicant determines to sell all the Bonds to purchasers other than the Government on terms at least as favorable as those offered by the Government, the Applicant may do so without obtaining the Government's consent thereto.

(c) If, before or after the Government has honored the first loan requisition, the Applicant determines to sell to purchasers other than the Government a portion of the Bonds, the consent of the Administrator to such sale will first be obtained to the end that the maturities of the Bonds to be purchased by the Government shall be satisfactory to the Administrator.

(d) If, after the Applicant has accepted the Offer to make a loan and a grant, a grant only is desired, because the Applicant has sold the Bonds to purchasers other than the Government or has otherwise provided its share of the cost of the Project, the Applicant will immediately notify the Administrator, and the Offer to make a loan and grant will remain effective for a grant

only, and the terms and conditions will remain equally applicable.

PART IV—CONSTRUCTION TERMS AND CONDITIONS.

1. PREREQUISITES TO GOVERNMENT'S OBLIGATION.—The Government shall be under no obligation to the Applicant to take up and pay for any Bonds or to make any grant:

(a) Submission to State Director.—If the Applicant shall not submit to the State Director of the Federal Emergency Administration of Public Works, his duly authorized representative, or any other person designated by the Administrator to perform the duties and functions of the State Director (hereinafter referred to as the "State Director"):

(1) two copies of proposed contract documents relating to the Project, before bids are invited for the particular contract;

(2) all proposed wage rate determinations referred to in the second sentence of Paragraph 9 of this Part IV, before such determinations are made;

(3) a written statement concerning the proposed award of each contract relating to the Project, before an award is made;

(4) all sets of executed contract documents relating to the Project and four sets of conformed copies thereof, before any work, service, material or equipment is performed or furnished thereunder;

(5) a written statement concerning the proposed award of each subcontract relating to the Project, before the award thereof is approved;

(6) a written statement concerning the

proposed assignment of any interest in or part of any contract relating to the Project, before an assignment thereof is approved;

(7) a written statement concerning each proposed extra, change, or additional work order intended to affect any contract relating to the Project, before such order is issued;

(8) a written statement concerning, and the pertinent plans and specifications for, any work for which the Administrator has waived the applicable provisions of the terms and conditions so as to permit the Applicant to perform such work otherwise than by contract, before such work is so performed;

(9) all proposed decisions referred to in the second sentence of Paragraph 10 of this Part IV, except decisions by the Board of Labor Review, before such decisions are made;

(10) a written statement concerning each architect or engineer whom the Applicant proposes to employ on the Project, before such architect or engineer is employed, together with one certified copy of each ordinance, resolution, order, or contract by which each architect or engineer is employed by the Applicant for work upon or in connection with the Project; and

(11) such other data, reports, records, and documents relating to the Project as the State Director may require;

in order that the State Director may examine the same and promptly advise the Applicant whether, in his opinion, the same are in compliance with applicable Federal statutes, the Offer, and the terms and conditions;

(b) Procedure after Submission.—If the Applicant, after having submitted to the State Direc-

tor the matters mentioned in sub-Paragraph *(a)* of this Paragraph, shall have proceeded without having been advised by the State Director to do so;

(c) Undue Delay in Construction.—If the Applicant shall not cause the construction of the Project to be commenced and continued with all practicable dispatch in a sound and efficient manner and in accordance with the plans and specifications;

it being the purpose of sub-Paragraphs *(a)* and *(b)* of this Paragraph to insure that the Applicant will be fully advised before it takes any step which might, in the opinion of the State Director, violate applicable Federal statutes, the Offer, or the terms and conditions, and to eliminate thereby the possibility that the Applicant will be responsible for a violation which would render it impossible for the Government to make the grant or loan or which might otherwise result in a delay in the construction of the Project.

2. CONSTRUCTION BY CONTRACT.—All work on the Project will be done under contract. The Applicant will give every opportunity for free, open, and competitive bidding for each and every construction, material, and equipment contract. The Applicant will give such publicity to advertisements or calls for bids by it for the furnishing to it of work, labor, materials, and equipment as will provide adequate competition and the award of each contract therefor will be made to the lowest responsible bidder as soon as practicable: *Provided,* That in the selection of equipment or materials the Applicant may, in the interest of standardization or ultimate economy, if the advantage of such standardization or such ultimate economy is clearly evident, award a contract to a responsible bidder other than the lowest in price.

3. CONTRACT SECURITY.—The Applicant will require that each construction contractor shall furnish a bond in an amount at least equal to 100 per cent of his

contract price as security for the faithful performance of his contract and for the payment of all persons performing labor and furnishing materials in connection therewith: *Provided*, That if applicable State or Territorial law requires a separate bond for the protection of laborers and materialmen, the Applicant will require that each such contractor shall furnish a bond in the amount above-stated for the faithful performance of his contract and a separate bond in an amount at least equal to 50 per cent of his contract price for the payment of all persons performing labor and furnishing materials in connection with his contract.

4. CONTRACTORS' INSURANCE.—The Applicant will require that each construction contractor shall maintain during the life of his contract, insurance as follows:

(a) Compensation Insurance.—Adequate Compensation Insurance for all of such contractor's employees who will be engaged in work at the site of the Project and, if any part of such contractor's contract is sublet, the contractor will require his subcontractor to maintain such insurance for all of the subcontractor's employees who will be so engaged unless the latter's employees are protected by the principal contractor's Compensation Insurance.

(b) Liability Insurance.—Adequate Public Liability and Property Damage Insurance to protect such contractor and all of his construction subcontractors from claims for damages for personal injury, accidental death, and to property, which may arise from operations under his contract, whether such operations be by himself or by any such subcontractor or by anyone directly or indirectly employed by either of them.

5. QUALIFICATIONS FOR EMPLOYMENT.—The Applicant will require that no person under the age of sixteen (16) years and no convict labor shall be employed on the Project. The Applicant will require that no person whose age or physical condition is such as to make his

employment dangerous to his health or safety or to the health and safety of others shall be employed on the Project: *Provided*, That this shall not operate against the employment of physically handicapped persons, otherwise employable, where such persons may be safely assigned to work which they can ably perform. The Applicant will require that there shall be no discrimination because of race, creed, color, or political affiliations, in the employment of persons for work on the Project. The Applicant will require that all employees engaged in work on the Project shall have the right to organize and bargain collectively through representatives of their own choosing, and that such employees shall be free from interference, restraint, and coercion of employers in the designation of such employees' representatives, in self-organization, and in other concerted activities of such employees, for the purpose of collective bargaining or other mutual aid or protection, and that no person seeking employment on the Project and no person employed thereon shall be required as a condition of initial or continued employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of such person's own choosing.

6. LABOR PREFERENCE AND EMPLOYMENT SERVICES.—The Applicant will require that with respect to all skilled, semi-skilled, and unskilled workers employed on the Project:

(a) Preference in employment shall be given to persons from the public relief rolls where such persons are available and qualified to perform the work to which the employment relates, and

(b) To the fullest extent possible workers required for the Project and appropriate to be secured through employment services shall be chosen from the list of qualified workers submitted by local employment agencies designated by the United States Employment Service: *Provided*, That union work-

ers, skilled, semi-skilled, and unskilled, shall not be required to register at such local employment agencies but, if such workers are desired by the employer, they shall be obtained through union locals in a customary manner which will insure compliance with subparagraph *(a)* of this Paragraph 6. In the event, however, that employers who wish to employ union workers are not furnished with qualified workers by the union locals within 48 hours (Sundays and holidays excluded) after request is filed by the employer, all workers shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service.

7. NONDISCRIMINATION.—The Applicant will require that, except as specifically provided above, workers who are qualified by training and experience and who, as above outlined, are referred for work on the Project, shall not be discriminated against on any grounds whatsoever.

8. HOURS OF WORK.—The Applicant will require that except in—

(a) Emergencies, which are defined as unforeseen occurrences and combinations of circumstances involving the public welfare or the protection of work already done on the Project or which endanger life or property and call for immediate action or remedy; or

(b) Special and unusual circumstances rendering it infeasible or impracticable to require adherence to the applicable limitations of hours herein set forth,

skilled, semi-skilled, and unskilled workers employed upon the Project shall not be permitted to work thereon more than 8 hours per day nor more than 40 hours per week: *Provided*, That the limitations of hours herein

set forth shall not apply to executive, supervisory, administrative, clerical, or other nonmanual workers[1] as such.

9. WAGE RATES.—The Applicant will require that minimum wage rates for employees in each trade and occupation engaged in work on the Project will be determined as required by applicable State or Territorial law. In the absence of such State or Territorial law, the Applicant will determine, prior to inviting bids for a construction contract, the minimum hourly wage rates for each such trade and occupation under such contract. Such minimum hourly wage rates will be determined (see Paragraph 1 *(a)* (2) of this Part IV) in accordance with rates prevailing for work of a similar nature in the locality in which the Project is to be constructed. The Applicant will also require that all determined minimum wage rates and all authorized deductions, if any, from unpaid wages actually earned shall be posted at appropriate conspicuous points on the site of the Project. Unless otherwise required by State or Territorial law, wage rates need not be established for executive, supervisory, administrative, clerical, or other nonmanual workers,[1] as such.

10. CLAIMS AND DISPUTES PERTAINING TO CLASSIFICATION OF LABOR.—Where there is a State or Territorial law requiring the determination of claims and disputes pertaining to the classification of labor employed on the Project, such claims and disputes will be handled in accordance with such law. In the absence of such law, claims and disputes pertaining to the classification of labor employed on the Project will be decided (see Paragraph 1 *(a)* (9) of this Part IV), by the Applicant: *Provided,* That instead of such claims and disputes being decided by the Applicant, both the parties concerned may, if they so agree and if the Applicant also agrees,

1. For example, Camp assistants, cooks, policemen, store-keepers, time-keepers, watchmen, waterboys, and messengers.

submit such claims and disputes to the Administrator who may, in his discretion, refer said claims and disputes to the Board of Labor Review of the Federal Emergency Administration of Public Works for decision.

11. PAYMENT OF EMPLOYEES.—The Applicant will require that each construction contractor and construction subcontractor shall pay each of his employees engaged in work on the Project in full (less deductions made mandatory by law) in cash and not less often than once each week.

12. CONVICT-MADE MATERIALS.—The Applicant will require that no materials manufactured or produced in a penal or correctional institution be incorporated into the Project.

13. DOMESTIC AND FOREIGN MATERIALS.—The Applicant will require that only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States of America, and that only such manufactured articles, materials, and supplies as have been manufactured in the United States of America substantially all from articles, materials, or supplies, mined, produced, or manufactured, as the case may be, in the United States of America, shall be employed in the construction of the Project: *Provided,* That the Applicant may, if it so desires, request the Administrator to waive the foregoing restrictions so as to permit the purchase of foreign articles, materials, or supplies, if the use of domestic articles, materials, or supplies is impracticable, or if the foreign articles, materials, or supplies are lower in cost after the following differentials are applied in favor of the domestic articles, materials, or supplies:

* * * * * * *

14. ACCIDENT PREVENTION.—The Applicant will require that precaution shall be exercised at all times for the protection of persons (including employees) and property, that the safety provisions of applicable laws,

building and construction codes shall be observed, and that machinery, equipment, and all hazards shall be guarded or eliminated in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not in contravention of applicable law.

15. INSPECTION.—The Applicant will require that the Administrator and his authorized representatives and agents shall be permitted and will itself permit them, to inspect all work, materials, pay rolls, records of personnel, invoices of materials, and other relevant data and records and the Applicant will submit, to the Administrator's authorized representative or agent such evidence as to the quality of materials as such representative or agent may require. The Applicant will provide and maintain or will require that there shall be provided and maintained during the construction of the Project adequate facilities at the site thereof for the use of the Administrator's representatives or agents assigned to the inspection of the Project.

16. SIGNS.—The Applicant will cause to be erected on the site of the Project at points and in positions to be designated by the Administrator's representative or agent assigned to the inspection of the Project, signs in such quantity and of such dimensions as will be designated by the State Director, which signs will bear the legend:

P. W. A.
FEDERAL EMERGENCY
ADMINISTRATION OF PUBLIC WORKS.

.....
(Description of Project)
PROJECT NO.....

17. CONSTRUCTION REPORTS.—The Applicant will require that there shall be submitted to it by each con-

struction contractor and will, in turn, submit to the Administrator's authorized representative or agent, schedules of the costs and quantities of materials and of other items, and that such schedules shall be in such form and shall be supported as to correctness by such of the estimates upon which they are based as such representative or agent may require. The Applicant will also require that there shall be submitted to it by each such contractor and will, in turn, submit as above-stated, the following records on forms to be supplied by the Government:

(a) Detailed Estimate, and *(b)* Periodical Estimates for Partial Payment.

18. REPORTS TO U. S. DEPARTMENT OF LABOR.—The Applicant will require that each construction contractor shall furnish to the United States Department of Labor, as early as practicable, the names and addresses of all of his construction subcontractors. The Applicant will also require that each such contractor and subcontractor shall report monthly to said Department, not later than the 5th day following the close of each calendar month, on forms and in accordance with instructions to be supplied by said Department, the number of persons directly employed under his contract who, during the particular calendar month, were on his pay rolls, the aggregate amount of each of said pay rolls, the man-hours worked, and the total expenditures for materials, which expenditures shall be itemized.

19. REPORTS TO AMINISTRATOR.—The Applicant will report monthly directly to the Administrator not later than the 5th day following the close of each calendar month, on forms and in accordance with instructions to be supplied by the Government, the total number of persons who were directly employed on the Project during the particular calendar month.

20. PAY ROLLS OF CONTRACTORS AND SUBCONTRACTORS.—The Applicant will require that each construction

contractor and each construction subcontractor shall prepare his pay rolls on forms prescribed and in accordance with instructions to be furnished by the Administrator; that not later than the 7th day following the payment of the wages, each such contractor shall transmit to such office as may be designated by said Administrator a certified legible copy and two conformed copies of each such pay roll; that each such pay roll shall be sworn to in accordance with the "Regulations Issued Pursuant to So-Called Kick-Back Statute", which Regulations are set forth in Part V hereof; and that each such contractor and subcontractor shall submit reports on forms as and when required by said Administrator, covering the purchases of and requisitions for materials, together with such other information as may be required to determine the progress and status of work on the Project.

21. PROJECT DATA AND RECORDS.—Promptly following the preparation of periodical pay rolls of construction contractors and of construction subcontractors, the Applicant will furnish the Administrator's authorized representative or agent with such number as may be required of certified copies of such pay rolls, on forms to be supplied by the Government. Such certified copies of such pay rolls will be accompanied by substantial proof that all bills for services rendered and materials supplied have been duly paid, and by such other data as such representative or agent may require. The Applicant will keep a record of Project costs in accordance with the classification of such costs used by the Administrator. The Applicant will furnish such information and data concerning the construction, cost, and progress of work on the Project (including copies of proposed and executed contract documents) as such representative or agent may require.

22. PAYMENT.—*(a)* Not later than the 15th day of each calendar month, the Applicant will make partial

payment to each construction contractor on the basis of a duly certified and approved estimate of the work performed during the preceding calendar month by the particular contractor, but will retain at least 10 per cent of the amount of each such estimate until final completion and acceptance of all work covered by the particular contract.

(b) The Applicant will require that each such contractor shall pay:

(1) For all transportation and utility services not later than the 20th day of the calendar month following that in which such services are rendered,

(2) For all materials, tools, and other expendible equipment, to the extent of 90 per cent of the cost thereof, not later than the 20th day of the calendar month following that in which such materials, tools, and equipment are delivered at the site of the Project, and the balance of the cost thereof not later than the 30th day following the completion of that part of the work in or on which such materials, tools, and equipment are incorporated or used, and

(3) To each of his construction subcontractors, not later than the 5th day following each payment to such contractor, the respective amounts allowed such contractor on account of the work performed by such subcontractors, to the extent of each such subcontractor's interest therein.

23. NAMING PROJECT. — The Applicant will not name the Project for any living person.

PART V—KICK-BACK STATUTE AND REGULATIONS.

1. KICK-BACK STATUTE.—The so-called Kick-Back Statute is Public, No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), and reads as follows:

AN ACT To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

SEC. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week.

2. REGULATIONS ISSUED PURSUANT TO SO-CALLED KICK-BACK STATUTE. — Pursuant to the provisions of Public, No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for

labor, the Secretary of the Treasury and the Secretary of the Interior have jointly made the following regulations:

SECTION 1. (This section quotes the Kick-Back Statute.)

SECTION 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of.....

County....., *ss*:

I,.....(name the party signing affidavit),.....(Title), do hereby certify that I am the employee of.....(name of contractor or subcontractor), who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of.....(project), for the weekly pay roll period from the....day of....., 193..., to the .... day of....., 193...; that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for

labor performed or to be performed under the contract for the above named project.

Sworn to before me this .. day of....., 193...

* * * * * * *

Plaintiffs' Exhibit 76.

Copy Conformed To
Executed Original
Dec. 29, 1938
Checked ..... Martz
Legal Division, PWA

P. W. 86575-3

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

Washington, D. C.,
Dated: Dec. 31, 1938
Docket No. Pa. 2016-F

School District of the City of Pittsburgh,
Pittsburgh, Allegheny County, Pennsylvania.

1. Subject to the Terms and Conditions (PWA Form No. 230, as amended to the date of this Offer), which are made a part hereof, the United States of America hereby offers to aid in financing the construction of a school building, including necessary equipment, the acquisition of necessary land, and the improvement of the grounds (all herein called the "Project"), by making a grant to School District of the City of Pittsburgh, Allegheny County, Pennsylvania (herein called the "Applicant"), in the amount of 45 percent of the cost of the Project upon completion, as determined by the Federal Emergency Administrator of Public Works (herein called the "Administrator"), but not to exceed, in any event, the sum of $139,108.

2. By acceptance of this Offer the Applicant covenants to begin work on the Project as early as possible but in no event later than December 31, 1938, and to complete such Project with all practicable dispatch, and in any event by April 8, 1940.

3. This Offer is made subject to the express condition that, if the Administrator shall determine at any time that the Applicant has paid or agreed to pay, whether directly or indirectly, a bonus, commission or fee to any person, firm or corporation for attempting to procure an approval of the Applicant's application, or for alleged services in procuring or in attempting to procure such approval, or for activities of the nature commonly known as lobbying performed or agreed to be performed in connection with the application, then the Administrator shall have the right, in his discretion, to rescind this Offer and any agreements resulting herefrom, and, in the event of such rescission, the United States of America shall be under no further obligation hereunder.

4. The acceptance of this Offer by the Applicant shall effectuate a cancellation of the contract created by the acceptance of the Offer dated August 15, 1938, made by the United States of America to the Applicant: Provided, that the cancellation of such contract shall not impair or vitiate any acts performed or proceedings taken thereunder prior to such cancellation, but such acts or proceedings may be continued under the contract created by the acceptance of this Offer.

UNITED STATES OF AMERICA
Federal Emergency Administrator
of Public Works
(Sgd.) E. W. CLARK
For the
By .....
Assistant Administrator

EXTRACTS FROM THE MINUTES OF A REGULAR MEETING OF THE BOARD OF PUBLIC EDUCATION SCHOOL DISTRICT OF PITTSBURGH, PENNSYLVANIA, HELD ON THE THIRD DAY OF JANUARY, 1939.

A regular meeting of The Board of Public Education of the School District of Pittsburgh, Pennsylvania, held pursuant to the foregoing call, was held on the third day of January, 1939.

The meeting was called to order by the President and on roll call the following answered present:

Mrs. Phillips, Mrs. Ridge
Messrs. Bialas, Fisher, Freese, Gerwig, Lewin, Voegtly, Young and Aaron.

The following were absent:

Mrs. Chalfant
Messrs. Doyle, Murray, Reed

After discussion of the Offer of the United States of America to aid by way of grant in financing the construction and equipment of the Spring Garden Elementary School, the following Resolution No. "N" of January 3, 1939, and entitled "A Resolution Accepting the Offer of the United States to The Board of Public Education, School District of Pittsburgh, Pennsylvania, to Aid by Way of Grant in Financing the Construction and Equipment of the Spring Garden Elementary School", was presented by Dr. Lewin and read in full.

"N"

A RESOLUTION ACCEPTING THE OFFER OF THE UNITED STATES TO THE BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PITTSBURGH, PA., TO AID BY WAY OF GRANT IN FINANCING THE CONSTRUCTION AND EQUIPMENT OF THE SPRING GARDEN ELEMENTARY SCHOOL.

Be it resolved by The Board of Public Education, School District of Pittsburgh, Penna.,

SECTION 1. That the Offer of the United States of America to The Board of Public Education, School District of Pittsburgh, Pa., to aid by way of grant in financing the construction and equipment of the Spring Garden Elementary School, a copy of which Offer reads as follows:

"Washington, D. C.
December 31, 1938.

Docket No. Pa. 2016-F

School District of the City of Pittsburgh,
Pittsburgh, Allegheny County, Pennsylvania.

1. Subject to the Terms and Conditions (PWA Form No. 230, as amended to the date of this Offer), which are made a part hereof, the United States of America hereby offers to aid in financing the construction of a school building, including necessary equipment, the acquisition of necessary land, and the improvement of the grounds (all herein called the "Project"), by making a grant to School District of the City of Pittsburgh, Allegheny County, Pennsylvania (herein called the "Applicant"), in the amount of 45 percent of the cost of the Project upon completion, as determined by the Federal Emergency Administrator of Public Works (herein called the "Administrator"), but not to exceed, in any event, the sum of $139,108.00.

2. By acceptance of this Offer the Applicant cove-

nants to begin work on the Project as early as possible but in no event later than December 31, 1938, and to complete such Project with all practicable dispatch, and in any event by April 8, 1940.

3. This Offer is made subject to the express condition, that, if the Administrator shall determine at any time that the Applicant has paid or agreed to pay, whether directly or indirectly, a bonus, commission or fee to any person, firm or corporation for attempting to procure an approval of the Applicant's application, or for alleged services in procuring or in attempting to procure such approval, or for activities of the nature commonly known as lobbying performed or agreed to be performed in connection with the application, then the Administrator shall have the right, in his discretion, to rescind this offer and any agreements resulting herefrom, and, in the event of such rescission, the United States of America shall be under no further obligation hereunder.

4. The acceptance of this Offer by the Applicant shall effectuate a cancellation of the contract created by the acceptance of the Offer dated August 15, 1938, made by the United States of America to the Applicant: Provided, that the cancellation of such contract shall not impair or vitiate any acts performed or proceedings taken thereunder prior to such cancellation, but such acts or proceedings may be continued under the contract created by the acceptance of this Offer.

UNITED STATES OF AMERICA
Federal Emergency Administrator
of Public Works
By E. W. CLARK (signed)
for the Assistant Administrator."

be and the same is hereby in all respects accepted.

SECTION 2. That said Board of Public Education, School District of Pittsburgh, Pa., hereby covenants as follows:

It is hereby covenanted that work on the project described in the Offer will be commenced as early as possible but in no event later than December 31, 1938, and will complete such Project with all practicable dispatch, and in any event by April 8, 1940.

SECTION 3. That said Board of Public Education, School District of Pittsburgh, Pa., agrees to abide by all the rules and regulations relating to such grant, a copy of which rules and regulations were annexed to the Government's Offer and made a part thereof.

SECTION 4. That C. L. Wooldridge, Superintendent of Buildings, be and is hereby authorized and directed forthwith to send to the Federal Emergency Administration of Public Works, three certified copies of this Resolution and three certified copies of the proceedings of this regular meeting in connection with the adoption of this Resolution, and such further documents or proofs in connection with the acceptance of said Offer as may be requested by the Federal Emergency Administration of Public Works.

MARCUS AARON
President

Attest:
H. W. CRAMBLET
Secretary

[SEAL]

The above Resolution was seconded by Mr. Fisher and was adopted with the following voting Yes:

Mrs. Phillips, Mrs. Ridge
Messrs. Fisher, Freese, Gerwig, Lewin, Voegtly, Young and Aaron.

and the following voting Nay:

Mr. Bialas

The President thereupon declared the said Resolution carried and he and the Secretary thereupon signed said Resolution in approval thereof.

Plaintiffs' Exhibit 107.

CITY OF PITTSBURGH, PA.

Voucher No. 2 3 7 1 3

Bond Fund

PWA

Oct 27th 1939

AMT. SEVEN HUNDRED TWENTY SEVEN & 59/100 • • • • • • • • • DOLLARS $727.59

In Account With

DEVLIN ELECTRIC CONSTRUCTION COMPANY

206 STANWIX ST — PITTSBURGH PA

P. W. A.

Date of Invoice	Amount			
10-25-39	727 59	DIC 7740	CA 136-19	—DOCKET 1987 — EST #1 —

Journal Control I. M. Q. Posted 2

Inspected and Passed for Payment

By .....D.....

Approved for Payment

By .....

Plaintiffs' Exhibit 107.

Form E 432 20M 4-39

DEPARTMENTAL INVOICE—To be transmitted to Controller in duplicate.

6744

CITY OF PITTSBURGH, DR.

Department Public Works Bureau of Engineering
to Devlin Electric Construction Company
206 Stanwix Street, Pittsburgh, Penna.

1939

Date	Item	Code Acct.	Amount	Total
Oct. 23	Construction of a Recreation Building at West Penn Playground. Contract No. 6—Electric CURRENT ESTIMATE No. 1	136-19	727 59	727 59

LIQUIDATED

Project Pa. 1987-F
Controllers No. 7740

P. W. A.

Original
Contract No. 7740
Pay 727.59
Liquidate 727.59
Examined H
Symbol No. 136-19
Paid by Voucher No. 23713

Approved: C. D. MCCARTHY, S
Chief Accountant

Certified Correct:
NATHAN SCHEIN
Title—Senior Designing Engineer

Approved for Payment:
F. M. ROESSING
Head of Department
By Director—DPW

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Plaintiff's Exhibit 107.

Charge 136-19
Project Pa. 1987-F
Controllers No. 7740

Oct 25 1939
OK Davis

CITY OF PITTSBURGH
DEPARTMENT OF PUBLIC WORKS
Bureau of Engineering

CURRENT ESTIMATE No. 1

For Construction of a Recreation Building at West Penn Playground.
Contract No. 6—Electric

Estimated Cost $10,000.00
Bond $ 9,832.00

Contract Price $9,832.00

Devlin Electric Construction Company, *Contractor*

Item No.	Description	Unit Quantity	Quantity	Work Accepted	Unit Price	Cost
1	Bond	L. S.	100%	100%	150.00	150.00
	Material Stored:					
	Conduit					658.43

Inspector Hill

Total Estimate - - - $808.43
Less 10 *percent* - - - - - - - - - - - - $ 80.84

Total Estimate less 10 *percent* - - - - - - - - - $727.59
Deduct previous Estimate - - - - - - - - - - - $

Current Estimate, showing amount due Contractor - - - - $727.59

Plaintiff's Exhibit 107.

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I certify that the work has been done in strict accordance with Plans, Specifications and Ordinances relative to the same and that the Contractor has fully complied with all the conditions of the contract.

H. K. KEIL,
Senior Assistant Engineer

..... NATHAN SCHEIN,
Division Sup't or Engineer — Senior Designing Engineer

The above estimate and statements are believed to be correct, and payment of $727.59 is recommended for approval.

10-24-39 CARL M. VETTER
Chief Engineer, B. of E.

Oct 25 1939 JOHN J. CROSSETT,
Chief Engineer, D. P. W.

F. M. ROESSING
Director

Checked and recommended for approval:

10-25-39 J. B. MCCANN
Departmental Checker

Oct 25 1939 C. D. MCCARTHY S
Chief Accountant
Approved 10/26/39

23713

CURRENT ESTIMATE No. 1

FOR

Construction of a Recreation Building
at West Penn Playground.
Contract No. 6—Electric
Devlin Electric Construction Co.
Contractor
$727.59

CITY OF PITTSBURGH, ss:

Personally appeared before me, the undersigned, who, being duly sworn, doth depose and say that the within Estimate is correct and true in all particulars, and the amounts contained therein are justly due to the parties therein shown, under the terms and conditions of the contract relative thereto, to the best of his knowledge and belief.

H. K. KEIL
Senior Assistant Engineer

***Sworn and subscribed this 24 day of* Oct. 1939.**

S. A. EARDLEY, P. C.
Controller.

P. W. A. Form No. I-23
Revised February 1939

FEDERAL EMERGENCY AMINISTRATION OF PUBLIC WORKS

Sheet 1 of 1 sheets

PERIODICAL ESTIMATE FOR PARTIAL PAYMENT NO. 1, DOCKET NO. PA. 1987-F
Contract No. 6

For the period August 16, 1939 to September 30, 1939, inclusive.

Location West Penn Plgd., Pittsburgh State Pennsylvania Type of project Recreation Building—Electric

Owner's name and address City of Pittsburgh
City-County Building
Pittsburgh, Penna.

Contract price, $9,832.00
(Lump sum)
Estimated Cost, $
(Unit price)
Estimated Cost, $
(Force account)

Contractor's name and adress Devlin Electric Construction Co.
206 Stanwix Street
Pittsburgh, Penna.

DETAILED ESTIMATE

WORK PERFORMED TO DATE

Item No. (1)	Number and Kind of Units (2)	Unit Price (3)	Estimated Cost (4)	Number of Units (5)	Amount Earned to Date (6)	Value of Uncompleted Work (7)	Per Cent Complete (8)
Completed Item:							
1	L. S.	150.00	150.00	1	150.00		100
Future Item:							
2 to 10 incl.:			9,682.00			9,682.00	
Material Stored:					658.43		
	Totals—		9,832.00		808.43	9,682.00	1.5

190

Plaintiff's Exhibit 107.

(Reverse Side)

NOTICE.

The project to which the contract herein referred to relates is a non-Federal project, the construction of which the United States of America, through the Federal Emergency Administration of Public Works, is aiding the owner in financing. In this connection, therefore, attention is directed to the following:

Section 9 of the Emergency Relief Appropriation Act of 1935, reads as follows:

"Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than 1 year, or both."

Section 35 of the U. S. Criminal Code, as amended, reads as follows:

"Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall

knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder shall be fined not more than $10,000 or imprisoned not more than 10 years, or both."

CERTIFICATE OF THE CONTRACTOR OR HIS DULY AUTHORIZED REPRESENTATIVE

To the best of my knowledge and belief, I certify that all items, units, quantities, and prices of work and material shown on the face of Sheets No. ..... of this Periodical Estimate are correct; that all work has been performed and materials supplied in full accordance with the terms and conditions of the corresponding construction contract documents between City of Pittsburgh and (Owner) Devlin Electric Constr. Co., dated 8-7-39, and all author- (Contractor) ized changes thereto; that the following is a true and correct statement of the contract account up to and including the last day of the period covered by this estimate and that no part of the "total amount due" has been received:

(a)	Total amount earned (col. 6)	$808.43
(b)	Retained percentage.....10%	$ 80.84
(c)	Total earned less retained percentage...	$727.59
(d)	Total previously approved	$ .....
(e)	Amount due this estimate.....	$727.59

(f) Unpaid from previous estimates..... $.....
(g) Total amount due..... $727.59

I further certify that all claims outstanding against Devlin Electric Constr. Co. for labor, materials, and expendable equipment employed in the performance of said contract have been paid in full in accordance with the requirements of said contract.

Contractor Devlin Electric Construction Co.
J. C. Devlin
Title Owner

Date October 3, 1939

CERTIFICATE OF THE OWNER'S SUPERVISING ENGINEER OR ARCHITECT IN CHARGE

I certify that I have verified this Periodical Estimate, and that to the best of my knowledge and belief it is a true and correct statement of work performed and materials supplied by the contractor, and that the contractor's certified statement of his account and the amount due him is correct and just, and that all work and material included in this Periodical Estimate have been performed in full accordance with the terms and conditions of the corresponding construction contract documents and authorized changes thereto.

Name City of Pittsburgh
By Nathan Schein
Title: Senior Designing Engineer

Date October 21, 1939

CERTIFICATE OF THE PUBLIC WORKS ADMINISTRATION ENGINEER INSPECTOR IN CHARGE

I certify that all work and material included in this Periodical Estimate have been inspected by me or my duly authorize assistants and have been found to com-

ply with the terms and conditions of the corresponding construction contract documents and authorized changes thereto.

Name John B. Tew
By John B. Tew
Title: Resident Engineer Inspector

Date October 24, 1939

REMARKS

Material Stored:
Keps Electric Company Conduit $ 658.43

*WARNING TO CONTRACTOR. If no claims are outstanding against the contractor, the clause "except such outstanding claims as are listed below or on the attached sheet, etc." must be deleted from the last paragraph of the contractor's certificate before the contractor signs it.

U. S. Government Printing Office 16-5773

Plaintiffs' Exhibit 150.

FEDERAL WORKS AGENCY
PUBLIC WORKS ADMINISTRATION
WASHINGTON

In Reply Please Refer To
Admin. B-11
Docket No. Pa. 1692-DS
School District
Borough of Braddock

Sept. 19, 1940

Mr. William C. Evans,
Superintendent,
Braddock Public Schools,
Braddock, Pennsylvania.

My dear Mr. Evans:

Receipt is acknowledged of your letter of September 10, 1940, in regard to the payment of additional grant on the above-mentioned project.

You are advised that the amount of $2,446.61, retained from this grant payment, cannot be paid to the School District until it has been determined what action is to be taken by the District in regard to the alleged collusion in connection with the bids submitted for the electrical contract on this project. As soon as this matter has been satisfactorily settled, consideration will be given to the payment of any additional grant allowable.

You have also requested reinstatement in the cost upon which grant is computed of certain construction costs which were excluded from grant participation. On the basis of the information available to this office these items are not eligible for reinstatement. If, however, the School District has additional information which it considers justification for the inclusion of these costs, such data may be submitted to this Administration. You may be assured that any information which you care to sub-

mit will be given careful consideration to determine its eligibility for reinstatement.

Sincerely yours,
J. J. MADIGAN
Executive Officer

CC: Regional Director, Region No. 1

Plaintiffs' Exhibit 169.

RESOLUTION OF COUNCIL OF THE BOROUGH OF CRAFTON, ALLEGHENY COUNTY, PENNSYLVANIA

IN MATTER OF AWARD OF CONTRACTS INVOLVED IN CONSTRUCTION OF MUNICIPAL BUILDING IN THE BOROUGH OF CRAFTON BEING IDENTIFIED AS PROJECT PA. 1703 DS

BE IT RESOLVED, by Council of the Borough of Crafton, Allegheny County, Pennsylvania, in Regular Meeting assembled this 17th day of December, 1937.

THAT WHEREAS, after full and complete preparation of plans and specifications for a new Municipal Building in the Borough of Crafton, Allegheny County, Pennsylvania, identified as Project Pa. 1703 DS, and after due and legal notice to bidders as to each of the four separate contracts involved in the construction of said Project, fixing and determining the time for opening bids to be 8:00 o'clock P. M. on Friday, the 3rd day of December, 1937, each and all of the bids submitted were, at the time above fixed, before Council of the Borough of Crafton, in meeting assembled, opened tabulated, examined and fully considered and the lowest bidder, as to each of the four separate contracts, which together provide for the complete construction of said Project or Municipal Building, and the amount of said respective lowest bids were found and determined to be as follows:

	Name of Bidder	Amt. of Bid
(a) Contract for general construction:	Henry Busse	$59,980.00
(b) Contract for heating and ventilating:	Eastern Plumbing & Heating	$ 4,190.00
(c) Contract for plumbing:	George H. Soffel Co.	$ 4,844.00
(d) Contract for electrical work:	Diamond Electric Co.	$ 5,735.00

AND WHEREAS, bond or certified check in the respective amounts required to insure good faith of the bidders, has been delivered with each of said lowest bids, to the Council of the Borough of Crafton, and

WHEREAS, each of said four lowest bidders has delivered to Council of the Borough of Crafton, a sworn statement as to the financial responsibility, the technical qualification and other pertinent data showing the ability of each of said lowest bidders to carry out and complete his or its contract, according to the plans and specifications governing and controlling the same.

NOW, THEREFORE, BE IT RESOLVED,

THAT, subject to the full and complete compliance by each of the said four contractors, with all the terms and conditions governing and controlling the award of each of said respective contracts, that the respective bids of the lowest bidders as to each of said four contracts above set forth, be and the same are hereby accepted and said contracts are hereby awarded as follows:

(a) The contract for general construction is hereby awarded to Henry Busse, at his bid of $59,980.00.

(b) The contract for heating and ventilating is hereby awarded to Eastern Plumbing and Heating Company, at its bid of $4,190.00.

(c) The contract for plumbing is hereby awarded to George H. Soffel Company, at its bid of $4,844.00.

(d) The contract for electrical work is hereby awarded to Diamond Electric Company, at its bid of $5,735.00.

BE IT FURTHER RESOLVED, That before entering into the performance of any of said contracts, each of the said contractors shall give his or its bond in a sum equal to the amount of his or its contract and its bond in the amount of fifty per cent to insure performance of labor involved in his or its contract with surety or sureties to be approved by Council of the Borough of Crafton.

Plaintiffs' Exhibit 190.

IN RE: PROJECT DOCKET NO. PA. 1575-D
FILTRATION PLANT
BOROUGH OF BRADDOCK, PA.
CONTRACT NO. 5—ELECTRICAL EQUIPMENT
BY D. R. ROSS ELECTRIC COMPANY OF
517 ARROTT BUILDING
PITTSBURGH, PENNSYLVANIA

RELEASE

WHEREAS, D. R. Ross Electric Company of Pittsburgh, Pennsylvania, entered into a certain written contract known as Contract No. 5, Electrical Equipment, Project Docket No. Pa. 1575-D, dated the 3rd day of March 1937, with the Borough of Braddock, a municipal corporation of the County of Allegheny, State of Pennsylvania, for the construction and erection of Electrical Equipment for the Filtration Plant at Braddock Borough Water Works, and,

WHEREAS, There remains due and owing to the said D. R. Ross Electric Company under the terms of the said contract the sum of ONE THOUSAND ONE HUNDRED TWENTY THREE DOLLARS and NINETY TWO CENTS ($1123.92); now therefore,

KNOW ALL MEN BY THESE PRESENTS, that D. R. Ross Electric Company, for and in consideration of payment by the Borough of Braddock to it of the aforesaid sum of ONE THOUSAND ONE HUNDRED TWENTY THREE DOLLARS and NINETY TWO CENTS ($1123.92) as well as for other good and valuable considerations, has released and forever discharged, and by these presents, for itself, successors and assigns, does release and forever discharge the said Borough of Braddock, its successors and assigns, from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, duties, sum and sums of money, accounts, reckonings, specialties, convenants, contracts, agreements, promises, variances, damages, judgments, extents, executions, claims and demands, whatsoever, in law or equity, or otherwise howsoever, which against the said Borough of Braddock ever existed or does exist in favor of the said D. R. Ross Electric Company, its successors and assigns, in consequence of its performance of the terms of the said contract hereinbefore described.

Signed, sealed and delivered this 1st day of July A. D. 1938.

D. R. Ross,
Owner.

Attest:

Subscribed and sworn to before me this 1st day of July, 1938.

A. E. GLAD,
Notary Public.

[SEAL]

In and for the County of Los Angeles, State of California.

My commission expires April 27, 1940.

D. R. ROSS ELECTRIC COMPANY
ENGINEERING - INSTALLATION - MAINTENANCE
ARBUCKLE BUILDING
PITTSBURGH, PA.

JUNE 24, 1938

Borough of Braddock
Allegheny County
Pennsylvania
Attention: G. M. Dillon

RE: Project Docket No. Pa. 1575-D

Gentlemen:

This is to certify that all debts of labor, suppliers of materials and sub-contractors and all debts incident to and growing out of our contract with the Borough of Braddock on Project Docket No. Pa. 1575-D have been paid by the D. R. Ross Electric Company.

D. R. Ross Electric Company,
D. R. Ross.

Subscribed to before me this 1st day of July, 1938.

DRR:DRA

A. E. GLAD,
Notary Public.

[SEAL]

In and for the County of Los Angeles, State of California.

My commission expires April 27, 1940.

Plaintiffs' Exhibit 213.

No. 177

SCHOOL DISTRICT OF THE TOWNSHIP OF KENNEDY
McKees Rocks, Pa. Dec. 23rd 1936

Pay to the order of
JOHN W. CRAIG ELECTRIC CO. $109. 60/100
Registered 355088 $109 and 60 cts Dollars

CHARLES E. HAAG
President
E. K. HAINES
Secretary

countersigned
F. B. REISDORF, Treasurer

Charge to Construction Fund.
To THE BANK OF McKEES ROCKS
60-363 McKees Rocks, Pa.

(Reverse Side)

John W. Craig Electric Co.
John W. Craig, Owner
PAY TO THE ORDER OF ANY BANK OR BANKER
4 8-30 or thru the Pittsburgh Clearing House D 8-30
Prior Endorsements Guaranteed
PITTSBURGH BRANCH
FEDERAL RESERVE BANK OF CLEVELAND
DEC. 24 1936

PAY TO THE ORDER OF
ANY BANK, BANKER OR TRUST CO.
Prior Endorsements Guaranteed
DEC 23 1936
WEST END BANK
8-64 Pittsburgh, Pa. 8-64
GEO. E. OSBORNE, Cashier

Pay to the Order of
ANY BANK BANKER OR TRUST CO.
Prior Endorsements Guaranteed
DEC 24 1936
FARMERS DEPOSIT NATIONAL BANK
8-11 Pittsburgh, Pa. 8-11
M. E. BOYLE, Cashier

P.W.A. Form No. I-23
Revised February 1939

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

Sheet 1 of 1 sheets

PERIODICAL ESTIMATE FOR PARTIAL PAYMENT OF NO. 8, DOCKET NO. PA. 1920-F

Contract No. 4 Elec.

For the period October 1, 1939 to October 31, 1939, inclusive.

Location West View State Pennsylvania

Owner's name and address School District of the Borough of West View, Penna.

Contractor's name and address Fort Pitt Electric Company 600 Second Avenue, Pittsburgh, Pa.

Type of project High School Bldg.

Contract price, $36,650.00 (Lump sum)

Estimated cost, $ (Unit price)

Estimated cost, $ (Force account)

	Detailed Estimate			Work Performed to Date			
Item No. (1)	Number and Kind of Units (2)	Unit Price (3)	Estimated Cost (4)	Number of Units (5)	Amount Earned to Date (6)	Value of Uncompleted Work (7)	Per Cent Complete (8)
	Completed Items						
1			550.00		550.00		100%
2	37000 lin. ft.	.0605 ft.	14,992.20		14,992.20		100%
4	378 units	12.65 E.	4,785.00		4,785.00		100%
6	1 unit		1,732.30		1,732.30		100%
7	31 units	24.40 E.	756.65		756.65		100%
8	40 units	61.75 E.	2,470.00		2,470.00		100%
	Active Items						
3	92000 lin. ft.	.0605 ft.	5,568.72	91,080'	5,513.04	55.68	99%
5	510 units	11.363 E.	5,795.13	459	5,215.62	579.51	90%
	Sub-Totals		36,650.00		36,014.81	635.19	98.2%
C.O.	#1—30 units	65.54E.	1,966.25	30	1,966.25		100%
C.O.	#2—1 unit		22.00	1	22.00		100%
C.O.	#3—L.S.		168.00		168.00		100%
C.O.	#4—L.S.		752.00			752.00	0
		Totals	39,558.25		38,171.06	1,387.19	96.4%

Plaintiff's Exhibit 815.

308

(Reverse Side)

NOTICE.

The project to which the contract herein referred to relates is a non-Federal project, the construction of which the United States of America, through the Federal Emergency Administration of Public Works, is aiding the owner in financing. In this connection, therefore, attention is directed to the following:

Section 9 of the Emergency Relief Appropriation Act of 1935, reads as follows:

"Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than 1 year, or both."

Section 35 of the U. S. Criminal Code, as amended, reads as follows:

"Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall

knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder shall be fined not more than $10,000 or imprisoned not more than 10 years, or both."

CERTIFICATE OF THE CONTRACTOR OR HIS DULY AUTHORIZED REPRESENTATIVE

To the best of my knowledge and belief, I certify that all items, units, quantities, and prices of work and material shown on the face of Sheets No. ..... of this Periodical Estimate are correct; that all work has been performed and materials supplied in full accordance with the terms and conditions of the corresponding construction contract documents between School District of the Boro. of West View and Fort Pitt Electric Co., dated
(Owner) (Contractor)
Jan. 5, 1939, and all authorized changes thereto; that the following is a true and correct statement of the contract account up to and including the last day of the period covered by this estimate and that no part of the "total amount due" has been received:

(a)	Total amount earned (col. 6)	$38,171.06
(b)	Retained percentage 10%	$ 3,817.10
(c)	Total earned less retained percentage..	$34,353.96
(d)	Total previously approved.....	$32,791.57
(e)	Amount due this estimate.....	$ 1,562.39
(f)	Unpaid from previous estimates.....	$.....
(g)	Total amount due.....	$ 1,562.39

I further certify that all claims outstanding against Fort Pitt Electric Co. for labor, materials, and expend-
(Contractor)
able equipment employed in the performance of said contract have been paid in full in accordance with the requirements of said contract, ~~except such outstanding claims as are listed below or on the attached sheet,* which statement contains all claims against the contractor which are not yet paid, including all disputed claims and any claims to which the contractor has or will assert any defense.~~

Contractor Fort Pitt Electric Company
By Walter F. Weberg
Title: Partner

Date November 2, 1939

CERTIFICATE OF THE OWNER'S SUPERVISING ENGINEER OR ARCHITECT IN CHARGE

I certify that I have verified this Periodical Estimate, and that to the best of my knowledge and belief it is a true and correct statement of work performed and materials supplied by the contractor, and that the contractor's certified statement of his account and the amount due him is correct and just, and that all work and material included in this Periodical Estimate have been performed in full accordance with the terms and conditions of the corresponding construction contract documents and authorized changes thereto.

Name C. H. Sorber, R. A.
By (Signed) Charles H. Sorber
Title: Architect

Date November 13, 1939

CERTIFICATE OF THE PUBLIC WORKS ADMINISTRATION
ENGINEER INSPECTOR IN CHARGE

I certify that all work and material included in this Periodical Estimate have been inspected by me or my duly authorized assistants and have been found to comply with the terms and conditions of the corresponding construction contract documents and authorized changes thereto.

Name W. C. Ellsworth
By (Signed) W. C. Ellsworth
Title: Resident Engineer Inspector

Date November 22, 1939

REMARKS

My certification of this estimate is qualified in the amount of $190.00. Change Orders No. 2 and 3 have not been approved by P.W.A. If the Owner elects to pay this amount he does so on his own responsibility.

(Signed) W. C. ELLSWORTH
W. C. Ellsworth
Resident Engineer Inspector PWA

---

*WARNING TO CONTRACTOR. If no claims are outstanding against the contractor, the clause "except such outstanding claims as are listed below or on the attached sheet, etc." must be deleted from the last paragraph of the contractor's certificate before the contractor signs it.

U. S. Government Printing Office 16-5773

(Separate paper)

Accepted: EDWARD A. YOUNG, Treasurer.

BUILDING ACCOUNT

SCHOOL DISTRICT - BOROUGH OF WEST VIEW

West View, Pennsylvania

SCHOOL WARRANT

No. 56 Date Nov. 24, 1939

To EDWARD A. YOUNG, Treasurer

Pay to the

Order of FORT PITT ELECTRIC COMPANY $1,562.39

One Thousand Five Hundred

sixty-two and 39/100**********DOLLARS.

F. S. BROWN,
President

HARRY G. CANNING,
Secretary

Payable at

MELLON NATIONAL BANK

8-26 PITTSBURGH, PA. 8-26

Do not Detach From Warrant

Distribution

H-5-H 1562 39

Invoice P.W.A. I-23

Dated Nov. 2, 1939.

(Reverse Side)

Endorsement Constitutes a Receipt in Full
for Account as Stated Within

ENDORSE HERE

PAY THE UNION TRUST CO.
of Pittsburgh, Pa., or Order
FORT PITT ELECTRIC CO.

PAY TO THE ORDER OF
ANY BANK OR BANKER
or thru Pittsburgh Clearing House
—RECEIVED AS COLLECTING AGENT—
Prior Endorsements Guaranteed
THE UNION TRUST CO.
of Pittsburgh Pennsylvania

NOV 27 1939 8-72 PM 4 1 8-72

Plaintiffs' Exhibit 264.

SCHOOL DISTRICT
OF THE
CITY OF McKEESPORT, DR.

To R. W. Schindler Electric Company
Address Pittsburgh, Pa.

To Invoice Attached Dated May 4, 1939 535.98

Examined W. T. NORTON Secretary

$535.98 Date 19

RECEIVED of the Secretary of the Board of School Directors, Warrant No. 28246 for the sum of Five hundred thirty-five and 98/100 Dollars in full payment of the above account.

Sign Here R. W. SCHINDLER ELECTRIC CO.
R. W. SCHINDLER.

DATE, SIGN AND RETURN THIS VOUCHER WITHOUT DELAY.
DO NOT DETACH PAPERS.

(Reverse Side)

CONSTRUCTION FUND
DOCKET NO. PA. 1935-F

SCHOOL DISTRICT OF THE CITY OF McKEESPORT

Warrant 28246 Voucher 1154

Amount $535.98
Date May 9, 1939
Favor R. W. Schindler Electric Co.
For Payment of Estimate No. 3—Project No. 1935-F—East End School Bldg.

Approved By The Committee On } Resolution of the Board—5/8/39

CHARGE TO ACCOUNT

No. 8 Capital Outlay.....535.98

DISTRIBUTION

H—Capital Outlay

5.....535.98

Total.....535.98

Plaintiffs' Exhibit 265.

PWCA Form No. 290
Revised 1-10-38

FEDERAL WORKS AGENCY
PUBLIC WORKS ADMINISTRATION

EXPLANATION OF DIFFERENCES BETWEEN AMOUNT OF GRANT REQUISITIONED AND AMOUNT PAID
SCHOOL PROJECT AT MCKEESPORT, PENNSYLVANIA

Requisition No. 3—Final
Docket No. Pa. 1935-F
P.W. No. 362.2092

Costs per PWA Classifications	Proj. Cost and Grant Claimed per req'n	App'd Grant Cost and Payment as audited	Amounts of Changes	Remarks
Preliminary Expenses	772.48	636.92	135.56	
Land, R/W and Easements	25,716.25		25,716.25	
Construction (Ex Eng.)	169,933.98	158,552.53	11,381.45	
Engineering	13,125.28	12,065.14	1,060.14	
Legal—Fees & Expense	800.00	456.00	344.00	
Other Admn. and Overhead	1.26	1.26		
Interest During Const'n	2,409.39	2,409.39		
Miscellaneous				
			38,637.40	

Plaintiffs' Exhibit 265.

TOTAL (Grant Base)	212,758.64	174,121.24	Explanation of Differences:
45% of Grant Base	94,950.00	78,354.56	
Less excess over Maximum Grant			
Allowable Grant	94,950.00	78,354.56	
Less			
Payments & Clearances	65,726.13	65,726.13	
PAYMENT	29,223.87	12,628.43	
Less		1,000.00*	
Payment, Balance		11,628.43	

* This amount has been temporarily suspended pending satisfactory settlement of alleged Wage Underpayments affecting painters on this and other dockets in Allegheny County.

(Details attached)

Date:
Serial No.

J. J. MADIGAN,
Executive Officer.

Docket No. Pa. 1935-F
Sheet #2—290

STATEMENT OF DIFFERENCES

EXCLUSIONS FROM GRANT BASE:

Preliminary Expense		$ 135.56
(a) That portion of Bond Expense applicable to Bond Proceeds not made available for project. Not eligible for inclusion in the grant base. 86/200 of $302.50	$ 130.07	
(b) Cost of advertising for bids on work outside the scope of the project (Razing old building). Not eligible for inclusion in grant base	5.49	
Land, R/W and Easements		25,716.25
(c) Cost of Land acquisition disapproved for inclusion in the grant base as outside the scope of the project	25,716.25	

Plaintiff's Exhibit 865

EIS

Construction:			
(d) Cost of extra piling and concrete foundation work in excess of amount approved on Change Order 5-1-1. Not eligible for inclusion in the grant base.			689.45
(e) Cost of resetting iron fence not submitted to PWA for approval. Not eligible for inclusion in the grant base		404.45	
		285.00	
Engineering			418.62
(f) Payments to Architect for services of his employees. Disapproved for inclusion in the Grant Base as being covered by basic fee			
Draftman's time	$ 148.23		
Office Clerk, keeping record of plans	20.00		
J. E. Geyser, Preparation of application	75.00	243.23	
(g) Payments to Architect for the following items disapproved for inclusion in the grant base for lack of detail:			
Mimeographing and Binding plans and specifications		91.18	
Re-blueprinting all drawings		84.21	

Legal Fees and Expenses		
(h) That portion of Legal Fees applicable to Bond proceeds not made available for project. 86/200 of $800.00		344.00
	344.00	
Total Exclusions		$ 27,303.88
SUSPENSIONS:		
Construction:		
Electrical contract #4 suspended pending action by the Owner regarding collusive bidding on this contract		10,692.00
Engineering		
Architects Fees 6% of $10,692.00 above		641.52
TOTAL EXCLUSIONS AND SUSPENSIONS		$ 38,637.40

Plaintiffs' Exhibit 265.

Plaintiffs' Exhibit 301.

HAMPTON TOWNSHIP SCHOOL DISTRICT

Directors

Charles S. McKeen, President,
Charles Backhaus, Vice President
Clyde E. Speer, Treasurer
Elmer G. Grant
Frank H. Hunter

Supervising Principal
Cyril C. Sarver
Allison Park, Pa.
Secretary
E. M. Hicks
Gibsonia, Pa.

REFERENCE:
P.W.A. Project No. Pa. 1069-R.

Gibsonia, Penna.
June 5th, 1936

Carter Electric Company,
Pittsburgh, Penna.

Gentlemen:

You are herewith instructed to commence work on the electrical work in the addition to the Hampton Consolidated school. This is in accordance with the contract which was awarded to your company, on December 1935.

Very truly yours

THE SCHOOL DISTRICT OF THE TOWNSHIP OF HAMPTON
By E. M. HICKS
Secretary.

Plaintiffs' Exhibit 566.

CONTRACT

BETWEEN

CITY OF PITTSBURGH and JOHN W. CRAIG

FOR

BURGWIN PLAYGROUND

(Stamped on front)

Oct. 10 1938

Approved as to conformity with Agreement between the Applicant and the United States of America.

G. DOUGLAS ANDREWS
Associate Director, Region No. 1

CITY OF PITTSBURGH
DEPARTMENT OF PUBLIC WORKS
Bureau of Engineering
P. W. A. Project No. Pa. 1634-F

Form No. 101

1. SEPARATE AND SEALED PROPOSALS will be received at the office of the City Controller, City-County Building until 10:00 A. M., Eastern Standard Time, October 3, 1938, and will be publicly opened and read aloud one hour later in Council Chamber, City-County Building for the Construction of a Bath House and Swimming Pool at BURGWIN PLAYGROUND: Contract No. 1, General Work; Contract No. 2, Plumbing Work; Contract No. 3, Heating Work; Contract No. 4, Electrical Work.
2. All bids must be made upon the prepared form of proposal to be on display and obtained at the Contract Office, Room 429 City-County Building on and after September 19, 1938.

3. The character and amount of bid security to be furnished by bidders is stated in the "Instructions to Bidders."
4. Copies of contract plans and specifications are on exhibit and may be obtained at Room 440 City-County Building. A deposit in the amount of $2.00 will be made for each set of contract plans and supplementary specifications for each contract, and $10.00 for the other contract documents. These deposits will be refunded to each actual bidder for one set of each upon their return without marks and in good condition. Other deposits will be returned with a deduction of $1.00 for plans and supplemental specifications, and of $5.00 for other contract documents, to defray the actual cost of reproduction of the sets of documents. If the plans and documents are not returned within ten (10) days after the opening of bids, the entire amount of deposit will be forfeited.
5. The Mayor and the Director of the Department of Public Works reserve the right to waive any informalities in, or to reject any or all bids.
6. No bid may be withdrawn for thirty (30) days after the scheduled closing time for receipt of bids.

Frank M. Roessing, Director
Department Public Works

Date September 19, 1938.

Cornelius D. Scully
Mayor

Form No. 102

CITY OF PITTSBURGH
DEPARTMENT OF PUBLIC WORKS
INSTRUCTIONS TO BIDDERS

Bidders Responsibility:

1A. Eac bidder shall familiarize himself with all of the attache forms, Instructions, General Conditions, Specifications, Drawings, etc., as he will be held responsible to fully comply therewith. Each bidder must visit the site of the work and acquaint himself with conditions affecting the work.

Time and Place of Opening Bids

2A. The separate and sealed bids or proposals for the construction of a Bath House and Swimming Pool at Burgwin Playground. Contract No. 4—Electrical Work will be received, upon the form of proposal prepared for each improvement, at the office of the City Controller, City-County Building, Pittsburgh, Pennsylvania, until the date and time stated in the official advertisement for bids and will be publicly opened and read aloud upon the same date in the place and at the time designated in the said advertisement.

Proposal Forms

3A. All bids shall be made on the prepared form of proposal provided for that purpose, copies of which may be obtained at the office of the Contract Clerk Department of Public Works, City-County Building, Pittsburgh, Pennsylvania, upon presentation of receipt for payment of charges for contract plans and specifications. Bidders shall submit prices for each and all items listed on the proposal form. The prices submitted shall be written out in full and also stated in figures for each item. All items on the Proposal Form must be filled in or the bids will not be considered.

The proposal shall be signed by the bidder or bidders with his or their business address, and shall contain the full names of all persons interested with him or them. If the bidder is a corporation the proposal shall be signed by a properly authorized officer of the Corporation and sealed.

Bid Bond

4A. Bidders are required to file with their proposal, sureties in the form of a Bond or a Certified Check in the amount of not less than 5 per cent of his "Bidders Proposal" for the proposed contract for unit price contracts or, in the case of base bid contracts, of his "Base Bid" for the proposed contract. Such surety shall be payable to the City of Pittsburgh and shall be forfeited as liquidated damages, if the bidder fails to execute the contract and conform with the form of agreement incorporated in the contract documents and furnish bonds as specified within five days after notification from the Director, so to do it.

The Bid Sureties will be returned to all except the three lowest bidders immediately after the awards, and the remaining Bid Sureties will be returned when the executed contracts are delivered to the successful Bidder.

Bond—How Executed

5A. The Bonds herein before required shall, before submission with the bid, be fully executed by both the bidder and the surety or sureties. Where the bidder is a corporation, the bond shall be signed by two officers of the corporation, who have been duly authorized so to do by appropriate action of the corporation, and the seal of the corporation shall be affixed. Where the bidder is an individual or individuals, the bond shall be signed by the individual or individuals affixing signatures to the bid. No changes or additions to the bond or

to the signatures thereon shall be permitted after the opening of bids. Where the bond has not been completely executed by either the bidder or the surety or sureties, said bid shall be invalid and will be rejected.

The successful bidder will be required to execute the Contracts and Bonds in duplicate.

Contractors to Be Qualified

6A. Bidders will be required to submit duplicate sworn statements of their financial responsibility, technical qualifications, and the performance record before contracts can be awarded to them. In order that there may be no delay in the making of awards, bidders should be prepared to submit such statements immediately after the bids are opened.

Time of Completion

7A. The Contractor shall commence work under his contract when ordered by the Director and shall fully complete all work there under within One hundred twenty consecutive calendar days from and including the date the General Contract is countersigned by the City Controller. Contractor for electrical, heating and ventilating and plumbing work shall be prepared to commence their work as soon as the work of the General Contractor is sufficiently advanced to permit them to do so, and shall carry on and complete their work so that the entire construction can be completed within the time limit set for the General Contractor.

Liquidated Damages:

8A. Should the Contractor fail to complete his work before the expiration of the date set for completion or as provided in the contract documents covering extensions of time, then the City may retain the sum of Ten ($10.00) dollars for each calendar day thereafter that the work remains uncompleted, which sum is agreed

upon as the proper measure of liquidated damages, which the City will sustain per diem by the failure of the contractor to complete the work at the time stipulated, and this sum is not to be construed as in any sense a penalty.

Extensions of Time: No Waiver:

9A. If any Contractor shall be delayed in the completion of his work by reason of unforeseeable causes beyond his control and without his fault or negligence, including but not restricted to, acts of God or of the public enemy, acts or neglect of the City, acts or neglect of any other Contractor, fires, floods, epidemics, quarantine restrictions, strikes, riots, civil commotions or freight embargoes, the period hereinabove specified for completion of the work shall be extended by such time as shall be fixed by the City.

No such extensions of time shall be deemed a waiver by the City of his right to terminate the Contract for abandonment or delay by the Contractors as herein provided or relieve the Contractor from full responsibility for performance of his obligations hereunder.

Certificate of Insurance:

10A. Successful bidders shall submit certificates or other documentary evidence to the City for approval, covering workmen's compensation insurance; and public liability and property damage insurance as well as any other insurance required by the contract documents.

Insurance Covering Special Hazards:

11A. The Contractor shall provide insurance covering special hazards where required by the specifications.

Regulations Issued Pursuant to So-Called "Kick-Back Statute" Public Act No. 324, 1934.

12A. The Regulations issued pursuant to so-called "Kick-back Statute" shall be strictly adhered to by all

parties identified with the project. Bidders' special attention is called to the schedule of minimum wage rates included in the General Conditions.

Special Notice:

13A. Bidders are required to inform themselves fully of the conditions relating to construction and labor under which the work will be or is now being performed, and each successful bidder must employ, so far as possible, such methods and means in the carrying out of his work as will not cause any interruption or interference with any other contractor.

Changes While Bidding

14A. During the bidding period, bidders may be furnished addenda or bulletins for additions to or alterations of the plans or specifications, such addenda, or bulletins shall be included in the work covered by the proposal and become a part of the contract documents.

If any prospective bidder on the proposed contract is in doubt as to the true meaning of any part of the Plans, Specifications or Contract Documents, he may submit to the Director a written request for interpretation thereof. The bidder submitting the request will be responsible for its prompt delivery. If in the opinion of the Director, the Plans, Specifications or other Contract Documents are not sufficiently clear, an addendum or bulletin will be mailed or delivered to each prospective bidder who has received a set of such documents. The City will not be responsible for any other explanations or interpretations of the proposed documents.

Tests

15A. Tests of material will in general be made by the City through their Bureau of Tests. Where the supplemental specifications so require, tests of materials or workmanship shall be paid for by the Contractor.

In this case the selection of Bureaus, Laboratories and/or Agencies for the inspection and testing of supplies, materials or equipment, shall be subject to the approval of the City. Satisfactory documentary evidence that materials have passed the required inspection and tests, must be furnished to the City.

Signs:

16A. The Contractor shall furnish and erect signs as required in the Supplemental Specifications.

Allowances:

17A. Where certain allowances may be made in the specification for material or equipment, the amount stated is to be taken into consideration by the Contractor. In case the selection of materials or equipment causes the amount to be exceeded, the Contractor will be paid extra in the net amount of the excess, with no addition or profit or overhead charges.

In case the cost of the materials or equipment is less than the amount stated in the specification then a credit is to be allowed by the Contractor to the City in the net amount of such saving. Bids for such materials or equipment will be requested by the City after due advertisement.

Awards

18A. Awards of contracts will be made to the lowest responsible bidder on the "Bidders Proposal" in the case of unit price contracts and on the "Base Bid" for contracts in that classification unless the bidder's proposal or the base bid exceeds the funds available for the contract. In the event that the base bid of the lowest responsible bidder exceeds the funds available for the contract the award will be made to that responsible bidder whose base bid, when reduced by the least number of alternates taken in the sequence specified, does

not exceed the funds available and is lowest in comparison with other bids in the same alternates.

Facilities to Be Provided and Maintained:

19A. The Contractor shall provide facilities for representatives or agents of the Federal Emergency Administration of Public Works as required in the Supplemental Specifications.

Unit Prices for Additions and Deductions.

20A. On Contracts for which Base Bids are requested for the major items of work such as for Bridges, Buildings, etc., and unit prices for additions to or deductions from the work are accepted and become a part of the contract, it is especially understood that such prices are intended to cover small quantities. In the event the quantities affected by a change are more than 10 per cent in excess of the original quantities as shown by the drawings or specifications the unit prices will not apply and supplemental agreements will be entered into, adjusting those unit prices.

Form No. 103

Estimated Cost $6,000.00.

PROPOSAL

P. W. A. Project No. Pa. 1634-F

To the Mayor and the Director Department of Public Works, City-County Building, Pittsburgh, Pennsylvania

This proposal is submitted in accordance with your advertisement inviting proposals to be received until 10:00 A. M., Eastern Standard Time, on October 3, 1938, for Construction of Swimming Pool and Bath House at Burgwin Playground—Electrical Construction and Fixtures and designated as P. W. A. Project No. Pa. 1634-F—Contract No. 4.

Having carefully examined the contract documents, comprising the plans, specifications and all documents bound therewith, or referred to therein together with all addenda or bulletins thereto, all as prepared by the City of Pittsburgh, and being familiar with the various conditions affecting the work, the undersigned herein agrees to furnish all material, perform all labor and do all else necessary to complete all Electrical Work for the construction of Swimming Pool and Bath House at Burgwin Playground, and do all contract work in accordance with said contract documents, for the sum of Forty-Eight Hundred & Seventy Dollars ($4,870.00).

PROPOSAL

Accompanying this proposal is a Certified Check in the amount of Two Hundred & Forty-Five Dollars ($245.00) as bid security.

The undersigned hereby certifies that this Proposal is genuine and not sham or collusive, or made in the interest or in behalf of any person, firm or corporation not herein named, and that the undersigned has not directly or indirectly, induced or solicited any other bidder to submit a sham bid, or any other person, firm, or corporation to refrain from bidding and that the undersigned has not in any manner sought by collusion to secure for himself an advantage over any other bidder.

October 3, 1938.

John W. Craig, d/b/a
Firm Name John W. Craig Electric Co.
By John W. Craig
Title: Owner.

Official Address 726 Herschel St., Pittsburgh, Pa.
Phone Wal. 1248.

GENERAL CONDITIONS

Contract Security.

1. The Contractor shall furnish a surety bond (form attached) in an amount at least equal to 100 per cent of the contract price as security for the faithful performance of this contract. The Contractor shall also furnish a separate surety bond (form attached) in an amount at least equal to 50 per cent of the contract price as security for the payment of all persons performing labor and furnishing materials in connection with this contract.

Insurance.

2. The Contractor shall not commence work under this Contract until he has obtained all Insurance required under this paragraph and such Insurance has been approved by the City, nor shall the Contractor allow any sub-Contractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

* * * * * * *

Proof of Carriage of Insurance.

3. The Contractor shall furnish the City with satisfactory proof of carriage of the insurance required.

Qualification for Employment.

4. No person under the age of sixteen (16) years and no person currently serving sentence in a penal or correction institution shall be employed to perform any work on the project under this contract. No person whose age or physical condition is such as to make his employment dangerous to his health or safety, or to the health and safety of others shall be employed to perform any work on the project under this contract: Provided, That this sentence shall not operate against the employment of physically handicapped persons

otherwise employable, where such persons may be safely assigned to work which they can ably perform. There shall be no discrimination because of race, creed, color, or political affiliations, in the employment of persons for work on the project under this contract. All employees engaged in work on the project under this contract shall have the right to organize and bargain collectively through representatives of their own choosing, and such employees shall be free from interference, restraint, and coercion of employers in the designation of such employees' representatives, in self-organization, and in other concerted activities of such employees, for the purpose of collective bargaining or other mutual aid or protection and no person seeking employment on the project under this contract and no person employed on the project under this contract shall be required as a condition of initial or continued employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of such person's own choosing.

Labor Preference and Employment Service.

5. With respect to all skilled, semi-skilled, and unskilled workers employed on the project under this contract.

(a) Preference in employment shall be given to persons from the public relief rolls where such persons are available and qualified to perform the work to which the employment relates, and

(b) To the fullest extent possible workers appropriate to be secured through employment services shall be chosen from the list of qualified workers submitted by local employment agencies designated by the United States Employment Service: Provided, That union workers skilled, semi-skilled, and unskilled, shall not be required to register at such local employment

agencies, but, if such workers are desired by the employer, they shall be obtained through union locals in a customary manner which will insure compliance with sub-paragraph (a) of this paragraph. In the event, however, that employers who wish to employ union workers are not furnished with qualified workers by the union locals within 48 hours (Sundays and holidays excluded) after request is filed by the employer, all workers shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service.

Non-Discrimination.

6. Except as specifically provided above, workers who are qualified by training and experience and who, as above outlined, are referred for work on the project under this contract, shall not be discriminated against on any grounds whatsoever.

Hours of Work.

7. (a) Except in emergencies, which are defined as unforeseen occurrences and combinations of circumstances involving the public welfare or the protection of work already done on the project or which endanger life or property and call for immediate action or remedy; or

(b) Special and unusual circumstances rendering it infeasible or impracticable to require adherence to the applicable limitations of hours herein set forth

Skilled, semi-skilled, and unskilled workers employed to perform work on the project under this contract shall not be permitted to work thereon more than 8 hours per day nor more than 40 hours per week: Provided, that

the limitations of hours herein set forth shall not apply to executive, supervisory, administrative, clerical or other non-manual workers* as such.

*For example, camp assistants, cooks, policemen, storekeepers, timekeepers, watchmen, waterboys, and messengers.

Wage Rates.

8. There shall be paid each employee engaged in work on the project under this contract in the trade or occupation listed below, not less than the wage rate set opposite the same, namely:

Trade or Occupation	Hourly Wage Rate

[Long list of occupations and rates omitted.]

In case it becomes necessary for the contractor or any subcontractor to employ on the project under this contract any person in a trade or occupation (except executive, supervisory, administrative, clerical, or other non-manual workers* as such) for which no minimum wage rate is herein specified, the contractor shall immediately notify the City through its Director, Department of Public Works, who will promptly thereafter furnish the contractor with the minimum rate. The minimum rate thus furnished shall be applicable as a minimum for such trade or occupation from the time of the initial employment of the person affected and during the continuance of such employment.

*For example, camp assistants, cooks, policemen, storekeepers, timekeepers, watchman, waterboys, and messengers.

Posting Minimum Wage Rates.

9. The Contractor shall post at conspicuous points on the site of the project a schedule showing all determined minimum wage rates and all authorized deductions, if any, from unpaid wages actually earned.

Claims and Disputes Pertaining to Classification of Labor.

10. Claims and disputes pertaining to the classification of labor employed on the project under this contract shall be decided by the City, Provided, that if the parties to the dispute so agree and if the City also agrees, the parties concerned may submit such claims and disputes to the Federal Emergency Administrator of Public Works for decision by the Board of Labor Review of the Federal Emergency Administration of Public Works.

Payment of Employees.

11. The Contractor and each of his sub-contractors shall pay each of his employees engaged in work on the project under this contract in full (unless deductions made mandatory by law) in cash and not less often than once each week.

Convict-Made Materials.

12. No materials manufactured or produced in a penal or correctional institution shall be incorporated in the project under this contract.

Domestic and Foreign Materials.

13. Only such unmanufactured articles, material, and supplies as have been mined or produced in the United States of America, and only such manufactured articles, materials, and supplies as have been manufactured in the United States of America substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States of America, shall be employed under this contract in the construction of the project.

Accident Prevention.

14. Precaution shall be exercised at all times for the protection of persons (including Employees) and

property. The safety provisions of applicable laws, building and construction codes of the City of Pittsburgh shall be observed. Machinery and equipment and all hazards shall be guarded in accordance with the safety provisions of the manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not in contravention with applicable law.

Inspection.

15. The Federal Emergency Administrator of Public Works and his authorized representatives and agents shall be permitted to inspect all work, materials, pay rolls, records of personnel, invoices of materials and other relevant data and records.

Construction Reports.

16. The Contractor shall submit to the City schedules of costs and quantities of materials and of other items, which schedules shall be in such form and shall be supported as to correctness by such of the estimates upon which they are based as the City may require. The Contractor shall also submit to the City the following records on forms to be supplied by the City.

(a) Detailed Estimate, and

(b) Periodical Estimates for Partial Payment.

Reports to U. S. Department of Labor.

17. The Contractor shall furnish to the United States Department of Labor, as early as practicable, the names and addresses of all of his subcontractors.

The Contractor and each of his subcontractors shall report monthly to said Department, not later than the 5th day following the close of each calendar month, on forms and in accordance with instructions to be supplied by the City, the number of persons directly employed under his contract who, during the particular

calendar month, were on his payrolls, the aggregate amount of each of said payrolls, the man-hours worked, and the total expenditures for materials, which expenditures shall be itemized.

Reports to the City.

18. The Contractor shall report monthly directly to the City not later than the 5th day following the close of each calendar month, on forms and in accordance with instructions to be supplied by the City, the total number of persons who were directly employed under his contract during the particular calendar month.

Payrolls of Contractors and Subcontractors.

19. The Contractor and each of the subcontractors shall prepare his payrolls on forms prescribed in accordance with instructions to be furnished by the City. Not later than the 7th day following the payment of wages, each such contractor shall transmit to the City a certified legible copy of each such payroll. Each such payroll shall be sworn to in accordance with the "Regulations Issued Pursuant to the So-called Kick-Back Statute", which Regulations are herein elsewhere set forth. The Contractor and each of his subcontractors shall submit reports on forms as and when required by the City, covering the purchases of and requisitions for materials, together with such other information as may be required to determine the progress and status of work under this contract.

Project Data and Records.

20. Promptly following the preparation of periodical payrolls of the Contractor and of each of his subcontractors, the Contractor shall furnish the City with such number as may be required of certified copies of such payrolls on form to be supplied by the City. Such certified copies of such payrolls shall be accompanied

by such substantial proof that all bills for services rendered and materials supplied have been duly paid as herein required and by such other data as the City may require.

Payment.

21. (a) Not later than the 15th day of each calendar month, the City will make partial payment to the Contractor on the basis of a duly certified approved estimate of the work performed during the preceding calendar month by the Contractor, but the City will retain 10 per cent of the amount of each such estimate until final completion and acceptance of all work covered by this contract.

(b) The Contractor shall pay:

(1) For all transportation and utility services not later than the 20th day of the calendar month following that in which such services are rendered.

(2) For all materials, tools, and other expendable equipment to the extent of 90 per cent of the cost thereof, not later than the 20th day of the calendar month following that in which such materials, tools, and equipment are delivered at the site of the project, and the balance of the cost thereof not later than the 30th day following the completion of that part of the work in or on which such materials, tools, and equipment are incorporated or used and

(3) to each of his subcontractors, not later than the 5th day following each payment to the Contractor, the respective amounts allowed the Contractor on account of the work performed by his subcontractors, to the extent of each such subcontractors interest therein.

Compliance with Kick-Back Statute and Regulations.

22. The Contractor and each of his subcontractors shall comply with the following statute and regulations issued pursuant thereto:

1. ***Kick-Back Statute.*** The so-called Kick-Back Statute is Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 938) and reads as follows:

> AN ACT to effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whoever shall induce any person employed in the construction, prosecution or completion of any public building, public work or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000 or imprisoned not more than five years or both.
>
> Sec. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior Jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week.

2. *Regulations Issued Pursuant to So-Called Kick-Back Statute.*

Pursuant to the provisions of Public Act, No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948) concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior have jointly made the following regulations:

SECTION 1. (This section quotes the Kick-Back Statute.)

SECTION 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week.

Said affidavit shall be in the following form:

State of .....

County of ....., ss:

I, ...,
(name the party signing affidavit)

..... do hereby certify that I am the
(Title)

employee of .....
(name of contractor or subcontractor)

who supervises the payment of the employees of said contractor (subcontractor):

that the attached payroll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of ..... (Project), for the weekly payroll period from the ..... day of ..... 19...., to the ..... day of ..... 19 ...., that no rebates or deductions from any wages due any such person as set out on the attached payroll have

been directly or indirectly made, and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat, or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

SWORN to before me this ..... day of ..... 19 .....

SECTION 3. Said affidavit shall be executed and sworn to by the officer or employee of the Contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered within seven days after the payment of the payroll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal Agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such seven-day period to the Federal Agency having control of the project.

SECTION 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a Contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the Contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that

such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the Contractor or subcontractor is a corporation, such affidavit shall be executed by its president or vice-president. In the event that the Contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

SECTION 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

SECTION 6. These regulations shall become effective on January 15, 1935.

3. *Construction of Regulations.*

The clause in the payroll affidavit which reads * * * that the attached payroll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * * is construed to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the Contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause * * * that no rebates or deductions from any wages due any such person as set out on the attached payroll have been directly or indirectly

made* does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called Kick-Back Statute" shall not be construed to prohibit deductions required by law.

* * * * * * *

Penalty for Non-Payment of Specified Minimum Wage Rate.

23. If the Contractor or any subcontractor shall pay any laborer or mechanic an amount less than the wage rate specified herein, the Contractor shall be subjected to a penalty in an amount equal to twice the difference between the minimum wage rate specified herein and the wage actually paid to each laborer or mechanic for each day during which he has been employed at a wage less than that herein specified. All such penalties shall be withheld by the City for its use: provided, however, that if the Contractor or subcontractor subsequently pays to all laborers and mechanics the balance of the amounts stipulated herein, the City will pay to the Contractor the penalties withheld.

City's Right to Stop Work or Terminate Contract.

24. If (a) the Contractor shall be adjudged bankrupt or make an assignment for the benefit of creditors, or (b) a receiver or liquidator shall be appointed for the contractor or for any of his property and shall not be dismissed within 20 days after such appointment, or the proceedings in connection therewith shall not be stayed on appeal within the said 20 days, or (c) the Contractor shall refuse or fail, after Notice or Warning from the Director, to supply enough properly skilled workmen or proper materials, or (d) the Contractor shall refuse or fail to prosecute the work or any part thereof with such diligence as will insure its completion within the period herein specified (or any duly authorized extension there-

of) or shall fail to complete the work within said period, or (e) the Contractor shall fail to make prompt payment to persons supplying labor or materials for the work, or (f) the Contractor shall fail or refuse to regard laws, ordinances or the instructions of the Director, or otherwise be guilty of a substantial violation of any provisions of this Contract, then, and in any such event, the City, without prejudice to any other rights or remedy it may have, may by 10 days Notice to the Contractor, terminate the employment of the Contractor and his right to proceed, either as to the entire work or (at the option of the City) as to any portion thereof to which delay shall have occurred, and may take possession of the work and complete the work by contract or otherwise, as the City may deem expedient. In such case the Contractor shall not be entitled to receive any further payment until the work is finished. If the unpaid balance of the compensation to be paid the Contractor hereunder shall exceed the expense of so completing the work (including compensation for additional managerial, administrative and inspection services and any damages for delay), such excess shall be paid to the Contractor. If such expense shall exceed such unpaid balance, the Contractor and his sureties shall be liable to the City for such excess. If the right of the Contractor to proceed with the work is so terminated, the City may take possession of and utilize in completing the work such materials, appliances, supplies, plant and equipment as may be on the site of the work and necessary therefore. If the City does not so terminate the right of the Contractor to proceed, the Contractor shall continue the work.

Contractor's Right to Stop Work or Terminate Contract.

25. If the Work shall be stopped by order of the Court or any other public authority, for a period of six months without act or fault of the Contractor or of any

of his agents, servants, employees, or subcontractors, the Contractor may upon 10 days' Notice to the City, discontinue his performance of the Work, and/or terminate the Contract, in which event the liability of the City to the Contractor shall be determined as provided in the paragraphs immediately preceding, except that the Contractor shall not be obligated to pay to the City any excess of the expense of completing the Work over the unpaid balance of the compensation to be paid the Contractor hereunder. .

City's Right to Withhold Payments.

26. The City may withhold from the Contractor, in addition to retained percentages, such an amount or amounts as may be necessary to pay just claims for labor and services rendered and materials furnished in or about the Work. The City shall have the right, acting as agent for the Contractor, to apply such retained amounts to the payment of such just claims.

Notice.

27. The term "Notice", as used herein, shall mean and include written notice. Written notice shall be deemed to have been duly served when delivered to or at the last known business address of the person, firm or corporation for whom intended, or to his, their, or to its duly authorized agent, representative, or officer: or when enclosed in a postage prepaid wrapper or envelope addressed to such person, firm or corporation at his, their or its last known business address and deposited in a United States mail box.

Changes and Alterations.

28. The City may at any time, by a written order, and without notice to the sureties, require the performance of such Changes and Alterations in the work as it may find necessary or desirable. The amount of com-

pensation to be paid to the Contractor for any Changes and Alterations, as so ordered, shall be determined as follows:

(a) By such applicable unit prices, if any, as are set forth in the Contract; or

(b) If no such unit prices are so set forth, then by a lump sum mutually agreed upon by the City and the Contractor; or

(c) If no such unit prices are so set forth and if the parties cannot agree upon a lump sum then by the actual net cost in money to the Contractor of the Materials and of the wages of applied labor (including premiums for Workmen's Compensation Insurance) required for such Changes and Alterations, plus such rental for plant and equipment (other than small tools) required and approved for such Changes and Alterations, plus fifteen per centum (15%) as compensation for all other items of profit, and costs or expenses including administration, overhead, superintendence, insurance (other than Workmen's Compensation Insurance), materials used in temporary structures, allowances made by the Contractor to subcontractors additional premiums upon the performance bond of the Contractor and the use of small tools.

The provisions hereof shall not affect the power of the Contractor to act in case of emergency, as herein provided.

Assignment of Contract.

29. No assignment by the Contractor of any principal construction contract or any part thereof, or of the funds to be received thereunder by the Contractor will be recognized unless such assignment has had the prior written approval of the City, and the surety has been given due notice of such assignment in writing in accordance with the terms of its bond.

Sub-Contracts.

30. No part of the contract shall be sublet without the prior written approval of the City.

* * * * * * *

Residence of Mechanics and Laborers.

32. Laborers and Mechanics employed on this project shall have been residents of the Commonwealth for at least ninety days prior to their employment. Failure to keep and comply with this provision shall be sufficient legal reason to refuse payment of the contract price to the Contractor.

Labor Discrimination.

33. The Contractor agrees:—

(a) That, in the hiring of employees for the performance of work under this contract or any subcontract hereunder, no contractor, subcontractor, nor any person acting on behalf of such contractor or subcontractor, shall by reason of race, creed or color discriminate against any *citizen* of the Commonwealth of Pennsylvania who is qualified and available to perform the work to which the employment relates.

(b) That no Contractor, subcontractor, nor any person on his behalf, shall in any manner, discriminate against or intimidate any employee hired for the performance of work under his contract on account of race, creed or color.

(c) That there may be deducted, from the amount payable to the Contractor under this Contract, a penalty of five dollars for each person for each calendar day during which such person was discriminated against or intimidated in violation of the provisions of this contract; and

(d) That this contract may be cancelled or terminated by the City, and all money due, or to

become due hereunder may be forfeited for a second or any subsequent violation of the terms or conditions of this portion of the Contract.

* * * * * * *

35. *Definitions.*

The following terms as used in the contract are respectively defined as follows:

(a) Subcontractor: A Person, firm, or corporation supplying labor and materials or labor for work at the site of the project.

(b) Work on the Project: Work to be performed, including work normally done, at the location of the Project.

(c) City: This term refers to the City of Pittsburgh. Where contractors and others required to take action with the City shall do so through the Director of the Department of Public Works of said City.

(d) Director: The Director of the Department of Public Works of the City of Pittsburgh or his duly authorized agents.

(e) The term "work performed" as used in Section 21 of these General Conditions, shall include acceptable materials delivered to and suitably stored at the site of the project.

36. *Sewer and Water Box Castings.*

Where castings are required in the construction of sewer catch basins, inlets, manholes, etc., and for water gate boxes and chambers, they will be furnished by the City under a separate contract.

37. *Use of Low Volatile Coal Required.*

The Contractor shall use only low volatile coal having a volatile content not to exceed 20% in all portable boilers not equipped with steam air siphons and to conform to such other regulations of the Bureau of Smoke

Regulations which are promulgated by said Bureau under the authority of Ordinance No. 566, approved January 4, 1927, and shall suspend all work requiring the operation of boilers during any period in which the above regulations are not complied with and that such suspension shall apply also when non-compliance obtains for temporary duration.

Engineering Services.

38. Where no engineering service is required by the Contractor, the Director will establish the lines, grades and elevations for the work and the Contractor shall execute the work to the lines, grades and elevations established therefor.

Where engineering services, are stipulated on Contract Plans, or Supplemental Specifications, to be furnished by the Contractor, the engineering work shall be done in the following manner:

The Director will provide line stakes for the curb lines and for slopes, and will establish bench marks at convenient points along the improvement for use in fixing the grades. The Director will also establish elevations at convenient points to fix the curb grade on repaving work. All other engineering services required for construction work shall be the responsibility of the Contractor who must, at his own expense, provide the necessary engineers and surveyors to do the work, and must furnish transit, level and other necessary surveying equipment and supplies for the performance of the work. The equipment provided by the contractor must be approved by the Director as to its condition and suitability. The City reserves, however, the right to check the Contractor's work in this respect to such extent as the Director may deem necessary and advisable. Failure to do such checking of work shall not relieve the Contractor from his responsibility for the accuracy of the construction in accordance with the contract plans and

specifications, or as ordered by the Director. The Contractor shall be required to protect the line and grade stakes set by the City Engineer, and any such stakes disturbed or removed for any cause or for any purpose shall be reset by the Contractor at his own expense. The Contractor shall furnish such laborers as will be required to assist the City Engineers in the performance of their work.

Engineer or Surveyor.

Where engineering service is required to be furnished by the Contractor, the Contractor shall employ an Engineer, or Surveyor, licensed to practise as such in the State of Pennsylvania. The selection of this Engineer shall be subject to the approval of the Director. The Engineer shall give his personal attention to the work, supervise in the field, the staking of all lines and grades run from base lines and bench marks placed by the City Engineers, and be available at all times and informed to discuss engineering questions arising during the life of the Contract.

Should the Engineer fail to comply with the above, approval will be withdrawn by the Director, and the Contractor shall then submit another Engineer for the Director's approval.

39. *Order of Work. Rate of Progress. Provisions to Insure Completion within Time Limit.*

The Contractor shall do the work herein prescribed at such times and in such places as the Director may require, and to begin and finish such parts or portions of work covered by this agreement as the said Director may require prior to beginning any other portion of said work. Immediately after the signing of this contract, the Contractor shall have prepared a schedule indicating the dates on which the Contractor will start and complete each principal item of work. Such schedule shall

conform to the dates and sequence of operations to which, in the opinion of the Director, work under this contract would be most satisfactorily prosecuted. After approval of such schedule by the Director, the Contractor shall strictly adhere to the provisions thereof. Completion of this contract within the time limit prescribed is the essence of this contract.

If required by the Director, in order to insure the completion of the work within the required time limit, the Contractor shall employ one or more shifts of labor at night, or on Sundays or holidays if so ordered, without extra compensation to the Contractor over and above payment made at contract unit prices for the respective items of work affected. However, failure of the Director to require the Contractor to employ one or more shifts of labor as aforesaid, or refusal of the Director to permit any work whatsoever to be done on Sundays, shall not in any way affect the provision of this contract requiring all work to be completed within the time limit specified, nor release the Contractor from any of the provisions of the Articles of Agreement relating to work unnecessarily delayed and violation of any of the conditions or covenants of the contract.

40. *Alterations and Extra Work.*

The Director shall have the right to order alterations and extra work, and shall have the right to make any alterations in the alignment, grade, arrangement, plans, details, quantity and quality of the work or materials required by the plans or specifications, or to omit any part thereof, or to order the Contractor to furnish any extra work or materials not called for in the plans and specifications that he may deem necessary or advisable, that in case of such alterations or omissions, or of extra work or materials being required the same shall be ordered by the Director; provided, however, no written order need be given by the Director to par-

tially or entirely eliminate contingent items of work in conformity with the provision of the Agreement.

41. *Price for Diminished Work.*

Deductions in price on account of either omissions or reductions in quantity of materials or work shall be figured at the unit price bid, and the Contractor agrees to make no claim for damages or for anticipated profit on account thereof.

42. *Price for Alterations and Extra Work.*

The price, if any, for alterations and the price for extra work shall be that agreed upon by the Director and the Contractor. In case of disagreement as to the compensation for such alterations or extra work, the Contractor agrees to furnish all materials, tools and labor required to complete such alterations or extra work in strict accordance with the plans, specifications and instructions of the Director for the actual reasonable cost thereof as determined by the Director and as hereafter stipulated and qualified plus 15% of such cost, except that no percentage shall be added for equipment rentals, tools furnished, compensation and public liability insurance nor to the cost of bond furnished account said alterations or extra work.

The Contractor shall submit for approval by the Director a schedule of rates to be paid working forces. Additional classes of working forces required shall be furnished upon order of the Director and at the rates approved in writing by the Director.

Overtime compensation for working forces, except men working on union schedule, shall be the same after the expiration of the 8 hour shift as before the expiration of such shift.

Compensation for general office overhead and general office administration cost shall be included in the Contractor's percentage of 15% paid for labor and materials as above provided.

The Contractor shall submit for approval by the Director a schedule of rental rates per diem or per hour, unless otherwise stipulated by the Director for trucks, teams, rollers, machine shovels, cranes, pile drivers, concrete mixers, compressors, pneumatic hammers and other such equipment required to carry out such alterations or extra work which shall stipulate the capacity, rating and grade thereof, and shall be exclusive of operating crew, fuel and other supplies required for the operation thereof, with the exception that the rental rate for trucks and teams, whether owned or hired by the Contractor, shall include all cost of drivers and fuel, and of Workmen's Compensation and public liability insurance.

The working day for equipment shall be considered as an 8 hour working day. Equipment held on the work available for use, but not used during the working day shall be paid for at ½ the rental rate stipulated in the approved schedule. Equipment used on regularly established second shift shall be paid for, for such shift, at the rate of ¾ of said rental rate. The maximum payment for equipment used in any calendar day shall not in any case exceed 1¾ of the payment computed on rental rates of said schedule for an 8 hour working day.

When ordered by the Director, as needed from time to time, the Contractor shall place equipment on the work in first-class condition subject to the approval of the Director, and it shall be returned in a like condition to the Contractor, ordinary wear excepted. Running repairs required incidental to the work shall be paid for as an item of cost plus 15%; provided, however, that material required for running repairs shall be paid for at actual cost without the addition of Contractor's percentage.

Payment for equipment as above provided shall cease when the Director notifies the Contractor to remove equipment from the work and such equipment shall

be removed from the work within 48 hours of the date of such notice. Transportation of plant and equipment from the Contractor's yard to the site of the work, setting up, dismantling and return of same to Contractor's yard shall be considered as an item of cost, and paid for as such, plus 15%.

All tools and materials remaining on the work fit for use at the completion of the work shall at the option of the Director be returned to the Contractor at an agreed upon price or prices approved by the Director, otherwise such tools and material shall remain the property of the City.

43. *Claims for Extra Compensation.*

All claims for extra compensation over and above the amount agreed upon in this contract, on account of any alterations or changes, or for any extra work, shall be filed with the Director by the Contractor with the original order for such alterations or changes or extra work attached thereto, within thirty (30) days after the completion of said alterations or changes, or extra work, and all claims for extra compensation on account of such changes or alterations or for extra work which are not presented within thirty (30) days after the completion of the same, shall be taken and deemed as waived and forfeited by the Contractor, and in the absence of the above mentioned written order from the Director, it will be deemed, taken and treated as conclusive by all parties hereto, that no changes or alterations have been ordered or made, and that no extra work has been ordered or done.

44. *No Charge For Delay..*

The Contractor will make no charge or claim whatsoever, for hindrance or delay of the work, from any cause during the progress of the same, except a claim for an extension of the time provided in this contract for

the completion of the work. Such a claim shall be made in writing upon the Director within thirty (30) days after the happening of the event or occasion, causing such delay or hindrance, setting forth the cause or causes of such delay of hindrance and the time lost by reason thereof. The decision of the Director as to the additional time to be allowed for the completion of the work, if any, shall be final and conclusive.

When the Director deems it advisable to give consideration to proposed changes in grade, width and position of roadway and sidewalks, or the character of material entering into this contract after physical work has been actually commenced, payment shall be agreed in writing to compensate the Contractor for any expense incurred by him due to idle time of foreman, workmen and equipment.

45. *Right to Construct Utilities.*

The City through the Director shall have the right to construct sewers, catch basins, culverts, and to build up or adjust manholes, to reset or renew frames, and heads for manholes, and to lay water pipes, gas pipes, conduits, or other structures on the line of the improvement and to grant permits for house connections with sewers, water, gas pipes, conduits, etc., on the line of the improvement at any time during the execution of the work under this contract; and if during the prosecution of this contract other contractors may be working within the lines of work of this contract, or within lines adjacent or contiguous thereto, either on contracts for the City or for public utility corporations, or others, the Contractors shall arrange to conduct operations in such manner as to cause least interference with each other. In case of dispute as to which contractor shall occupy certain territory and have priority to do certain work the Director shall make the decision which shall be final and must be complied with.

The Director may suspend work under this contract, or any portion thereof at any time for purposes above stated, or when traffic conditions may require, or for any other purpose, without compensation, except as above provided in section 44 hereof, to the Contractor for such suspension other than an extension of time for completing the work equal to the time lost for such suspension, and the Contractor shall not interfere with, or place any impediment in the way of any person, or persons, who may be engaged in any of the aforesaid operations, or doing any work on the line of the improvement deemed necessary by the Director.

Contractor Liable for "Ys" and Laterals.

46. The Contractor shall be responsible and liable for the placing of "Y" connections and house laterals in the location and to the grade as shown on the contract plans or as ordered by the Director in the field; and should the Contractor omit or fail to construct any such "Ys" or laterals, and said omission or failure to construct cause the City or others any expense by reason thereof after the contract is completed and accepted, the Contractor shall be held liable for the entire cost of placing or constructing said "Ys" or laterals in accordance with the requirements of the contract.

Corporations to be Notified.

47. Where the property of franchise-holding corporations, or individuals, form an obstruction to the work, the Director will notify said corporations, or individuals, to protect their property, and order reconstruction where necessary.

Supervision and Inspection.

48. The work shall be at all times under the immediate supervision of the Director, or those whom he may designate, who shall at all times have free access to all parts of the work and all places where materials for the

same are prepared, and shall have every facility rendered him for the proper inspection of all materials entering into, and workmanship executed for the work under this contract, but it is expressly understood that the inspection of the work and materials by the Director will in no way lessen the responsibility of the Contractor or release him from his obligation to perform and deliver to the City sound and satisfactory work, and the orders of the Director shall be obeyed by the Contractor and by all persons employed on the work.

Re-Inspection. Condemned Work to be Removed.

49. Materials or work once accepted by the Director may be rejected at any time should any defects in same be discovered before the entire work has been finally accepted and fully paid for and shall be removed within 48 hours thereafter, and further agrees that the Director may require the Contractor to remove and replace any portion of the work covered by the maintenance provisions of the Contract which is found to be defective, either as to quality or quantity at any time before the expiration of the said guarantee period, provided in this Contract, and that when so ordered by the Director, the Contractor shall remove the said work and materials and replace same with satisfactory materials at his own expense in conformity with this Contract.

Employees Dismissal.

50. The Contractor shall discharge and not again employ, without the consent of the Director, any employe of his who has used profane or abusive language to any employe of the City of Pittsburgh, or any employe of his who impedes or embarrasses any employe of the City in the performance of his duty, or any employe of his, who, in the opinion of the Director, is careless or incompetent, or who obstructs the progress of

the work or disobeys or evades the instructions of the Director.

Discontinuance of Work Unnecessarily Delayed, or Executed in Bad Faith. Director empowered to Complete Work.

51. If at any time the Director shall be of the opinion that the said work, or any part thereof, is unnecessarily delayed, or that at the rate of progress being made, the work will not be completed within the contract time, or that the Contractor is wilfully violating any of the conditions or covenants of this agreement, or is executing the same in bad faith, he shall have the power to notify the Contractor to discontinue all work under this contract, or any part thereof, and thereupon the Contractor shall cease said work, and the Director shall have the power to place such and as many persons as he may deem necessary to work at and complete the work herein described, or any part thereof, and to use such materials, tools, supplies and equipment as he may find upon the location of the said work, or to procure other materials, tools and supplies, and to rent equipment deemed necessary for the completion of the same, or to contract with other parties pursuant to Law for the prosecution of all work remaining uncompleted, and to charge the cost and expense of said labor, materials and supplies, and for rental of said equipment, or of such contract for completing the work to the Contractor, and the cost and expense so charged shall be deducted from and paid by the City out of such monies as may then be due, or at any time thereafter become due, to the Contractor under and by virtue of this Contract, and in case such cost and expense is less than the sum which would have been payable under this contract, if the same had been satisfactorily completed by the Contractor, then the said Contractor shall be entitled to receive the difference, but in case such cost and ex-

pense shall exceed the last said sum, then the Contractor, his executors, administrators, or assigns shall pay the amount of such excess to the City within thirty (30) calendar days after date of notice of the Director of the excess due.

Street Improvements Disturbed Outside Neat Payment Lines to be Restored at Contractor's Own Expense.

52. The Contractor shall at his own cost and expense, relay, repair or reconstruct, as may be ordered by the Director, all roadway pavement surfacing, bases therefor, sidewalk pavements and curbs that may become damaged, removed or disturbed in areas outside the neat payment lines provided in this contract, for any such types of construction so affected from any cause whatsoever, by reason of the operations of the Contractor's failure to provide proper methods, precautions or safeguards, or by negligence of any kind, or failure to adhere strictly to the provisions of this contract, or to instructions given in the field; provided, however, that failure of the Director to issue instructions governing the manner in which work is to be carried out, or his acquiescense in the manner in which the contractor elects to carry out work shall not relieve the Contractor of any of the aforegoing responsibilities and requirements.

Further, the Contractor shall, at his own cost and expense, relay, repair, or reconstruct, as may be ordered by the Director, any of the foregoing types of construction that subsequently may become disturbed, or damaged in areas outside the neat payment lines provided in this contract, for any of such types of construction, during a period of one year after the completion of work under this contract and acceptance thereof by the Director, by reason of trenching for retaining walls and sewers, or by excavation for catch basins, manholes, shafts and various types of chambers, or by tunnelling

and benching for construction of underground structures.

The Contractor shall, at his own cost and expense, keep the pavements, sidewalks, and curbs so relaid, repaired or reconstructed, in good repair satisfactory to the Director, in conformity with the requirements of the Contract for a period of one year after date of final acceptance of all work embraced under this contract.

Contractor to Sustain All Losses.

53. All loss or damage arising out of the nature of the work or any damages to the work itself, to be done under this contract, for any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from any cause whatsoever, until the same shall have been finally accepted and fully paid for, shall be sustained and paid by the Contractor.

Contractor Responsible Until Work is Completed.

54. The Contractor shall have charge of and be responsible for the entire work until completed and accepted by final payment; he shall give his personal supervision to the faithful prosecution of the work; he shall keep it under his own control, and in case of his absence, shall have a competent representative or foreman on the work, who shall receive orders and instructions from the Director, and have full authority to execute the same and to supply materials, tools and labor without delay.

Protection, Supporting and Maintenance of Structures.

55. The Contractor shall maintain the service of, shore up, sling, support, protect and make good as directed, all water pipes, gas pipes, service pipes, sewers and sewer connections, conduits, manholes, drains, vaults, buildings, tracks or other structures, and sub-

structures of public utility companies, all service lines and structures including sub-structures of private abutting owners, that are located within the lines of the improvement, whether shown on the contract plans or not, that may be liable to disturbance or injury during the progress of the work, and that all necessary supports and all labor and material necessary to reconnect and restore all such structures that become disturbed or damaged to their original condition shall be provided by him at his own expense, with the exception of such permanent supports as may be ordered by the Director.

* * * * * * *

All additional cost and expense of labor, materials and tools involved by any change in the alignment and/or grade of any structures and trenches therefor, that are included in this contract shall be borne by the Contractor and no claim for compensation for any such cost and expense shall be made, except when the basis for such compensation is agreed upon in writing by the parties hereto before the work causing such cost and expense is commenced; provided, however, that payment for Trench Excavation or Extra Trench Excavation and for Sheeting, Shoring and Bracing the open trenches will be made in conformity with the requirements of the Specifications.

Contractor Liable for Damages.

56. The Contractor shall not obstruct the streets, street railways, steam railroads, passenger travel or traffic or river navigation, without the consent of the proper authorities, and shall observe the laws of the same; he shall place and at all times keep proper guards, fences, barricades, watchmen, etc., and at night suitable and sufficient lamps for the prevention of accidents; he shall observe police regulations and city ordinances; he shall indemnify and save harmless the City its officers, employes and agents, from all suits, actions and proceed-

ings of every kind which may be brought against the City, or its officers, employes or agents, for or on account of any injuries or damages to persons or property received or sustained by any person or persons, firm or corporation by or from the Contractor, or his employes or agents, while engaged in the prosecution of the work under this contract, or by or in consequence of any materials or explosives used on said work, or by or on account of any improper materials or workmanship used in its construction, or by or on account of any accident that may occur during the performance of the work, or by or on account of any patent invention or article or arrangement that may be used by the Contractor in the work to be done or the material furnished for the work under this contract, or by or on account of any other act either of omission or commission of the Contractor, or of his agent, or employes, and as much money due him under and by virtue of this contract as the Director may consider necessary, shall be retained by the City until all suits or claims for damages as hereinbefore mentioned, which may have been filed with the Director before or immediately after the completion of the work embraced under this contract, shall have been determined and settled and satisfactory evidence thereof furnished to the Director.

Use of City Water.

57. In case the Contractor uses water from the city pipes for any and all the work herein specified or shown upon the contract plans, all such water used shall be paid for by the Contractor at the established current meter rates of the city and in accordance with the rules and regulations of the Bureau of Water and Board of Water Assessors governing the use of same.

Maintenance of Highways.

58. If active work is discontinued on the improvement of any street, way, or other public highways, due

to the intervention of winter weather, or the Contractor's inability to proceed with the work from any other cause, the Contractor shall, at his own cost and expense, and in a manner satisfactory to the Director, maintain said highways during such periods in a safe and passable condition for vehicle and foot travel by furnishing and placing cinders, gravel, granulated or crushed slag, broken stone or lumber to the width and depth ordered by the Director. Such material shall be placed in layers, and shall be rolled and compacted to the satisfaction of the Director.

When due to delays caused or ordered by the City and not due to failure of the Contractor to fulfill the terms of his contract, work is carried into winter weather, any maintenance required by the City shall be paid for by the City. However, where winter weather intervenes in a contract, the Director shall have the right to order the Contractor to discontinue all concrete work between November 15th and March 15th, during which period the Contractor shall at his own cost and expense maintain highways as hereinbefore required.

Estimate of the Director to be Final.

59. The measurements taken and the estimates and certificates made by the Director shall be final and conclusive evidence of the amount of material furnished and work performed by the Contractor under and by virtue of this Contract, and shall be taken as the full measure of compensation to be received by the Contractor.

CITY OF PITTSBURGH
DEPARTMENT OF PUBLIC WORKS
BUREAU OF ENGINEERING

Supplementary Specifications for the Construction of a Swimming Pool, Bath House and Appurtenances at Burgwin

PLAYGROUND

W. P. A. DOCKET NO. PA. 1634 — F

CONTRACT NO. 4 ELECTRICAL WORK

August 1938

Plans and Specifications

1. All work done and material furnished under this contract shall be in accordance with the Contract Plan Accession No. G-1838 and the Contract Documents, the laws and regulations of the Board of Fire Underwriters and the Bureau of Electricity, City of Pittsburgh, except as otherwise stipulated herein or on the Contract Plan.

Scope of Work.

2. The Contractor shall furnish all tools, labor, material equipment and other facilities necessary to complete and install in a first-class workmanlike manner all electrical fixtures, for inside and outside lighting, underground service for lighting and power, flood light poles, panel and distribution boards, connection of motors and all other electrical work, fixtures and apparatus, all in accordance with the Contract Documents and orders of the Director in the field.

Bidders to Make Inspection.

3. The Contract Plan shows in a general way the work to be done and the bidder shall personally inspect the location of the proposed work and determine in his

own way the working conditions, difficulties and obstructions to be encountered at the site of work.

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Conduit Cutting and Threading.

7. As the work of the building nears completion all threading, cutting, etc., shall be done in the basement or where directed by the Director.

Ordinances and Electric Code.

8. Nothing contained in this specification or shown on the contract plan shall be so construed as to conflict with any local, municipal or state laws or regulations, governing the installation of electrical or other work specified herein, and all such ordinances and regulations, including the Electric Code of the City of Pittsburgh, are hereby incorporated and made a part of these specifications.

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He shall also obtain all certificates of inspection and approval from the Bureau of Electricity, Department of Public Safety and shall mail same to the Director before final payment is made.

Temporary Light.

10. The General Contractor will provide all temporary wiring and lamps required and pay for all current used for a sufficient general illumination to properly execute the work of all trades, including Electrical, Heating and Plumbing, as determined by the Director.

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Service Connections.

14. The Director will make arrangements with the Duquesne Light Co. for meter and service connections as required.

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The arrangement of all conduits and the method of

fastening same shall be subject to the approval of the Director. Not more than four 90 degrees bends shall occur in any one run of rigid steel conduit. Where conditions necessitate more bends, a junction box shall be installed to facilitate pulling in wires.

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The right is reserved to change the exact location of outlet in any room before same is installed. Such change to be at the option of the Director.

Unless otherwise indicated, outlet boxes in walls shall be located with center line at the following elevation above the finished floor line:

Switch outlets	4′—0″
Bracket Outlets	6′—4″
Plug receptacles	3′—0″
Plug receptacles 2nd Floor—in wood base	
Distribution panels	4′—0″
Door Bell	7′—0″

If these heights must be changed to meet building conditions, the Contractor shall use new dimensions given by the Director.

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Guarantee and Maintenance.

43. The Contractor agrees to accept the provisions of the Contract Documents as relating to maintenance for all work to be done under this contract and, further, he agrees to consider as a part of said maintenance, all expense necessary to keep all work done, and equipment installed under this contract in a first-class operating condition satisfactory to the Director for a period of one year from the date of final acceptance by the City.

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Signs and Facilities.

45. This Contractor will not be required to furnish signs designating the Project or facilities for the P.W.A. engineers.

Insurance, Special Hazards.

46. The following special hazards shall be covered by rider or riders to the Public Liability and, or Property Damage Insurance policy or policies required in Section 2b of the General Conditions or by separate policies of insurance. This insurance shall be for the amounts given below and more fully defined in said Section 2b.

Automotive insurance covering trucks and automobiles of contractors and any Sub-contractors in the amount of $10,000-$20,000 personal and $5,000 property.

The Contractor shall furnish the City at the time of awardal of Contract to him, three (3) certificates of each insurance policy required above and in Section 2 of the General Conditions. Each certificate shall contain, in addition to other information, the effective and expiration dates of the policy and the amounts of coverage. Each certificate shall further recite that the policy contains a statement that the policy cannot be cancelled by the insurer in less than ten (10) days after the insured has received written notice of cancellation.

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Form No. 105

GENERAL.

Sections 1 to 35, Inclusive.

Materials and Work Included.

1. The Contractor shall furnish all labor, tools, material and equipment necessary and do all work incident to the manufacture and erection of the construction covered by this contract. All materials and workmanship shall be in strict accordance with the contract plans, the following and such special or supplementary specifications as may be made for this contract and such instructions as may be issued by the Director during the progress of the work. When the supple-

mentary specifications are attached as part of the contract and conflict with the following specifications, those so attached shall take precedence.

Director's Approval On all Construction Materials.

2. All materials required for the proper and workmanlike completion of this contract shall be approved by the Director before being incorporated in the work. The Director reserves the right, through the Bureau of Tests, to have any and all materials tested and analyzed by said Bureau of Tests, in order that he be positively assured that all materials conform to and properly meet the specifications adopted by the Department of Public Works, City of Pittsburgh.

Contract Plans and Specifications Furnished by the City.

3. The contractor will be furnished, free of cost to him, such copies of contract plans and specifications as may be required for his use during the execution of the work. These plans will show the forms, dimensions, arrangement and materials, also the locations and elevations of the various parts forming the structure. Steel plans will show the stresses to which the various members of the structure are to be subjected, the make-up of the members, their form and general arrangement.

Where so stated in the supplementary specifications, the City will furnish full size detail drawings for ornamental work which will require clay models and moulds to secure proper finish, for special ornamental cast iron work and for name plates.

Contractor to Check City's Plans.

4. All dimensions shown on Contract Plans are based on surveys, and/or taken from plans of work now in existence, and/or under construction. The Contractor shall check all dimensions in the field, which govern the location or fit of work under this contract,

with work now in existence, and/or under construction. He shall also check the Contract Plans for any errors existing thereon, at the earliest date possible, and any errors found shall be reported to the Director for correction in order to avoid any delay in the completion of the work.

The Contractor assumes responsibility for the existence and correction of all errors in dimensions and work and shall perform all necessary work caused by inaccuracies on the plans or in the field without additional compensation.

Working Drawings Furnished by Contractor.

5. For stone masonry, the contractor shall prepare working drawings for each separate unit of the structure. These drawings shall show each course of stone in plan with its individual stones in place and dimensioned in figures and be marked with a number indicating its position in the course and a letter or letters to indicate the position of the course in the structure; the structure in elevation, or vertical section, showing the courses with their distinguishing letters.

For reinforced concrete masonry the contractor shall prepare detail working drawings showing location, sizes and arrangements of all reinforcing bars and structural steel, describing fully by figures all lengths, spacing and bends, giving the number of pieces and lengths of each piece or member.

For all structures requiring the use of falsework during erection the Contractor shall submit to the Director for his approval three sets of prints of the complete drawings of the falsework, including foundations, bents, bracing, arch centering, trusses, floor system, falsework, forms, etc. These drawings will be examined and the Contractor's attention called to any weakness which may be discovered, however, the City assumes no

responsibility for weaknesses that may develop in any part of the falsework.

For steel grillages the Contractor shall prepare shop working drawings describing fully by dimensons and notes the work to be done at the shop fabricating the work.

For pneumatic caisson work the Contractor shall prepare complete working drawings of the Caissons he proposes using, giving in figures all dimensions and all sizes of parts and materials.

For cofferdam work the Contractor shall prepare complete working drawings showing the dimensions of the cofferdam and its construction, bracing and the methods he proposes to use in placing the masonry work therein.

For structural steel the Contractor shall prepare shop or detail working drawings of all parts or members of the steel work, descibing fully by dimensions and notes, the work to be done by the Contractor.

Where sewers or portions thereof are to be constructed by the tunnel method no work shall be commenced thereon until detailed plans for same shall have been prepared by the Contractor and submitted to and approved by the Director, in conformity with the requirements of "Details of Construction," governing "Tunnelling."

All detail or working drawings shall be made in ink on tracing cloth and shall be the same size and have the same arrangement of border lines, title space and space for approval by City as the contract plans furnished by the City. The title on such drawings shall give the name of the contract, name of the Contractor and the work detailed thereon.

Blueprints to be Submitted for Checking.

6. After the tracings have been checked by the Contractor, blue-prints therefrom in duplicate shall be

submitted to the Director for examination, one copy of which will be returned to the Contractor with such corrections as the Director may desire noted thereon. The examination by the Director will consist only in an inspection as to the strength of the structure and the general location of main members; however, this examination shall in no manner be considered as relieving the Contractor of responsibility for the proper size and location of members as shown on the contract plans.

Tracing Submitted for Approval.

7. Upon receipt of corrected blueprints, the Contractor shall correct the tracings in accordance with the corrections noted on the blueprints by the Director, and submit the tracings to the Director for his approval.

Making Changes on Approved Drawing.

8. No changes or alterations shall be made on the tracings after they have been approved by the Director, except by written permission or direction of the Director.

Tracings, etc., to become Property of City.

9. All tracings, original copies of sketch sheets and shop or material bills for the various members of the structure shall become the property of the City and must be delivered to the Director before final payment on the contract will be made.

Mill Orders.

10. The Contractor shall furnish the Director with duplicate copies of all mill orders he places with the mills for materials to be used on the contract, also of all orders for castings and miscellaneous materials which he purchases that are to form a part of the finished structure. All orders shall show the date they were placed.

Shipping Bills or Statements.

11. The Contractor shall furnish the Director duplicate copies of all shipping bills or statements which shall show the number of pieces, their marks and weights for all parts of the structure shipped to the site. Whenever materials for erection purposes which do not enter into the finished structure are shipped with material for the structure, such materials shall be marked on the shipping statement as erection material. Shipping statements must show date of shipment and the car numbers containing the shipment.

Order for Reinforcement.

12. The Contractor shall not order any structural or reinforcement steel until the submitted detail drawings have been approved by the Director and notice has been given the Director with what firm or firms the order or orders are to be placed. Such notice shall state the quantity of material ordered and the location of the mill and shop where the material will be rolled and fabricated. Orders for material shall not be unnecessarily scattered among different manufacturers. The Contractor shall furnish the Director with duplicate copies of all orders for structural and reinforcing steel at the time the orders are placed with mills and shops, and copies of shipping statements when the material is shipped from mills and shops.

Models and Moulds.

13. Where noted on the contract plans that models and moulds are to be used in constructing ornamental parts, the Contractor shall construct clay models from the full size detail drawings furnished by the City. These models shall be subject to the approval of the Director.

The approved clay models shall be used to construct plaster moulds which shall be placed in the forms and

used in casting the ornamental parts. The moulds shall also be subject to the approval of the Director.

Where so noted in the contract plans or in the supplementary specifications, the models will be furnished by the City.

Storage of Materials.

14. Buildings, yards or sidings that may be required for the delivery or storing of materials shall be provided by and at the cost of the Contractor. All materials thus stored shall be placed upon sleepers, housed or covered, so as to properly protect them against the action of falling or surface water, to the satisfaction of the Director.

Old Materials.

15. All old materials existent within the confines of the contract shall remain the property of the City of Pittsburgh except when otherwise stipulated in these specifications, on the contract plans or in special or supplemental specifications or ordered by the Director in the field, in which case the same shall be disposed of at the expense of the Contractor.

Office for Engineers and Inspectors.

16. The Contractor shall, if ordered by the Director, provide a suitable room near the work, with heating provision, plan table, chairs, locker and telephone service for the use of engineers and inspectors.

* * * * * * *

Sunday Work.

20. The employment of labor for overtime or Sunday work shall be only with the permission of the Director.

Sub-Contracts.

21. Immediately following the countersigning of this contract by the City Controller the Contractor shall submit in writing, to the Director for approval, information as to whom he proposes sub-letting any portion of this contract, whether such sub-contract be for labor or material or both. This communication shall also show what portions of the work or materials he proposes having supplied by each sub-contractor. The Director reserves the right to refuse or accept this proposal and the Contractor hereby agrees to abide by the Director's decision.

Contractor to Locate his Work.

22. The Contractor shall accurately locate his work as to alignment, position and elevations, as shown on contract plans; using monuments, points and bench marks furnished by the Director.

Director to have Access to Work.

23. The Director shall have access to all parts of the work during its construction and preparation for construction, and after completion, to do all checking, inspecting and measuring he may deem necessary. The Contractor shall build all temporary platforms or scaffolds necessary for the performance of the work to the satisfaction of the Director. No materials shall be used in the construction until the Contractor is notified by the Director of its acceptance for use. When work is to be done outside the regular hours, the Contractor shall secure the consent of the Director so that the inspector may be present and at all times shall prosecute his work in a systematic way so as to facilitate supervision by the inspector. The presence of the inspector shall not in any wise lessen the responsibility of the Contractor for construction in accordance with contract requirements.

Injury to Work.

24. The Contractor shall use due precautions against injury to his work or the sub-structure upon which he is erecting his work, and shall place and maintain such signals and protection guards as may be required by the Director.

Protection to Adjoining Property.

25. Where the foundations for any part of the structure are close to the tracks of a railroad, wall of a building, retaining wall or other structure, the Contractor shall provide suitable shoring and bracing to support same during his operations and properly back-fill excavations between such structures and the parts of the structure being built. All shoring, bracing and backfilling shall be subject to the approval of the Director.

Access to Adjoining Property.

26. The Contractor shall provide suitable access to adjoining private property. Where in his operations he interferes with entrances that existed before he began work, new entrances shall be built and maintained in a substantial and safe condition by the Contractor and be subject to the approval of the Director.

Bridges over Streets.

27. Whenever a bridge is to be erected over streets, boulevards or roads, openings in the falsework shall be provided as directed by the Director to accommodate the traffic on such street, boulevard or road. The Contractor shall, if ordered by the Director, protect the traffic using said openings from falling of construction materials, by placing covers over the openings.

Structures over and under Railroad Tracks.

28. Where structures cross the right-of-way or tracks of a railroad company, the Contractor shall ob-

tain permits from the proper officials of the railroad company owning or operating the railroad in question before he proceeds to place any materials or falsework over, under or on the right-of-way of the railroad company. The Contractor shall file with the Director a copy of the permit secured from the railroad company.

All expense involved in connection with the possible placing of watchman, or the erection of any temporary structures deemed necessary, shall be adjusted entirely between the Railroad and the Contractor. The Contractor shall relieve the City of all responsibility for any and all damage or expense claimed by the Railroad for all precautions taken or for any accidents that might occur.

Bridges over Navigable Streams.

29. Whenever a bridge is to be erected over a navigable stream, the Contractor shall obtain from the United States War Department the necessary permits to place obstruction to navigation in the stream before starting the placing of falsework or erecting steel work. Copies of such permits, together with blueprints approved by the War Department, shall be placed on file with the Director.

Sub-structures in Navigable Stream.

30. Before starting work on any sub-structure located between the U. S. harbor lines in a navigable stream the Contractor shall secure a permit from the U. S. War Department covering his work. He shall also place and maintain all signals required by them.

Workmanship.

31. All workmanship shall be first class in every respect. All work shall be done by competent workmen, skilled in the kind of work upon which they are employed and directed by competent foremen.

Inspecting and Testing.

32. All materials and workmanship of whatever kind entering into the work shall be subject to the inspection and approval of the Director at any and all times during the progress of and until final completion and acceptance of the work.

Acceptance of Materials and Workmanship.

33. Inspection and acceptance by the Director of any materials or workmanship of whatever kind shall not relieve the Contractor from his responsibility.

No Extra Work Unless Authorized.

34. No extra work shall be commenced nor will be considered as such, except upon written authorization of the Director.

Engineering Services.

35. As required in the Contract, the Contractor shall employ an Engineer or Surveyor licensed to practise as in the State of Pennsylvania. The selection of this Engineer shall be subject to the approval of the Director. The Engineer shall give his personal attention to the work, supervise in the field, the staking of all lines and grades run from base lines and bench marks placed by the City engineers, and be available at all times and informed to discuss engineering questions arising during the life of the Contract.

Should the Engineer fail to comply with the above, approval will be withdrawn by the Director, and the Contractor shall then submit another Engineer for the Director's approval.

THIS AGREEMENT

MADE the Oct 8 1938 day of ....., in the year 1938, by and between John W. Craig, d/b/a JOHN W. CRAIG ELECTRIC COMPANY, of 726 Herschel St., Pittsburgh, Pa. hereinafter called the "Contractor,"

and

CITY OF PITTSBURGH, a municipal corporation of the State of Pennsylvania, acting in this behalf through Cornelius D. Scully Mayor, and Frank M. Roessing Director of the Department of Public Works of said City, they having been duly authorized thereto by Ordinance of the Council of said City, hereinafter called the "City";

WITNESSETH:

ARTICLE 1. SCOPE OF WORK.

The Contractor shall furnish all of the materials and perform all of the work shown on the drawings and described in the specifications, entitled—Construction of a Bath House and Swimming Pool at Burgwin Playground. Contract No. 4—Electrical—and shall do everything required by this Agreement and the contract documents.

ARTICLE 2. TIME OF COMPLETION.

The work to be performed under this contract shall be commenced when ordered by the Director, and shall be fully completed within One Hundred Twenty (120) consecutive calendar days from and including the date the General Contract is countersigned by the City Controller.

ARTICLE 3. THE CONTRACT SUM.

The City shall pay the contractor for the performance of the contract, subject to additions and deductions

provided therein, in current funds as follows: Four Thousand, Eight hundred seventy dollars ($4,870.00).

ARTICLE 4. PAYMENTS.

(a) Payments shall be made in accordance with Section 21 of the General Conditions, and shall be at the price or prices set up in the proposal as accepted.

(b) The term "work performed" in Section 21, Paragraph (a) of the General Conditions, shall be construed to include acceptable materials suitably stored on the site, as well as incorporated in the project.

ARTICLE 5. THE CONTRACT DOCUMENTS SHALL CONSIST OF THE FOLLOWING:

(1) Advertisement.

(2) Instructions to bidders.

(3) Proposal (as accepted).

(4) General Conditions.

(5) Supplemental Specifications:

(6) Specifications, including addenda or bulletins.

(7) Drawings.

(8) Bonds executed by the Contractor.

This Agreement together with these documents form the contract, and they are as fully a part of the contract as if hereto attached or herein repeated.

The following is an enumeration of the drawings:

Sheet No.	*Acc. No.*	*Description*
1	G-1838	Plan, Riser Diagram and Details

The following is an enumeration of addenda or bulletins:

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in duplicate, the day and year first above written.

JOHN W. CRAIG [SEAL]
John W. Craig, d/b/a
JOHN W. CRAIG ELECTRIC CO. [SEAL]
Witness Contractor.
RALPH J. DAVIS

CITY OF PITTSBURGH
By CORNELIUS D. SCULLY,
Mayor

Attest: Oct. 8 1938
BLAIR A. WILSON,
Mayor's Asst. Secretary [SEAL]

By F. M. ROESSING,
Director, Dept. of Public Works
J. PAUL JENNINGS,
Chief Clerk, Dept. of Public Works

This contract approved as to form:
ANNE X. ALPERN,
First Asst. City Solicitor

Examined by: October 7, 1938
HIRAM SCHOCH,
Assistant City Solicitor

Countersigned, October 8, 1938.
JAMES P. KERR,
City Controller

John W. Craig, d/b/a JOHN W. CRAIG ELECTRIC COMPANY has filed his ficticious name certificate with the Contract Clerk, D. P. W.

RALPH J. DAVIS.

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS, that I John W. Craig, d/b/a JOHN W. CRAIG ELECTRIC COMPANY, of 726 Herschel St., Pgh., Pa. as principal, and as surety, are held and firmly bound unto the City of Pittsburgh, their certain attorney, successors, or assigns (hereinafter called the Obligee), in the full and just sum of Forty-Eighth Hundred & Seventy —— 00/100 —— Dollars ($4,870.00) lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, administrators, executors, successors, and assigns, jointly and severally, firmly by these presents:

WHEREAS said principal has entered into a certain contract with said Obligee, dated Oct. 8, 1938, (hereinafter called the Contract) for Construction of Swimming Pool and Bath House at Burgwin Playgrounds, P.W.A. Project No. PA. 1634-F Contract No. 4—Electrical which contract and the specifications for said work shall be deemed a part hereof as fully as if set out herein.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the principal shall faithfully perform the contract on his part at the time and in the manner therein provided and satisfy all claims and demands incurred in or for the same, or growing out of the same, or for injury or damage to persons or property in the performance thereof, and shall fully indemnify and save harmless the said Obligee from any and all cost and damage which the said Obligee may suffer by reason of failure so to do, and shall fully reimburse and repay the said Obligee any and all outlay and expense which it may incur by reason of any such default, then this obligation shall be null and void; otherwise it shall remain in full force and virtue.

The said surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the contract or to the work to be performed thereunder or the specifications accompanying the same shall in any wise affect its obligations on this bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the contract or to the work or to the specifications.

Approved:
CORNELIUS D. SCULLY,
Mayor.

Attest:
BLAIR A. WILSON,
Assistant Secretary.

SIGNED, SEALED AND DELIVERED IN DUPLICATE THIS 8th day of October, 1938.

(Individual Principals Sign Here)

John W. Craig, d/b/a
JOHN W. CRAIG ELECTRIC COMPANY
JOHN W. CRAIG [SEAL]

In the presence of:
RALPH J. DAVIS.

(Corporate Principal Sign Here)
(Surety sign here)

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK
By THOMAS E. SPITTAL, [SEAL]
Attorney.

Witness:
RALPH J. DAVIS.

LABOR AND MATERIALMEN'S BOND

(See instructions on third page following)

KNOW ALL MEN BY THESE PRESENTS, THAT I, John W. Craig, d/b/a JOHN W. CRAIG ELECTRIC COMPANY, of 726 Herschel St., Pittsburgh, Pa., as principal, and as surety, are held and firmly bound unto the City of Pittsburgh, their certain attorney, successors, or assigns (hereinafter called the Obligee) in the penal sum of Forty-Eight Hundred & Seventy 00/100 Dollars ($4,870.00) lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, personal representatives, successors and assigns, jointly and severally, firmly by these presents:

WHEREAS said principal has entered into a certain contract with said Obligee, dated Oct 8 1938, (hereinafter called the Contract for Construction of Swimming Pool and Bath House at Burgwin Playgrounds, P.W.A. Project No. PA. 1634-F. Contract No. 4—Electrical which contract and the specifications for said work shall be deemed a part hereof as fully as if set out herein.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH that if said principal and all sub-contractors to whom any portion of the work provided for in said contract is sublet and all assignees of said principal and of such subcontractors shall promptly make payment for all labor performed, services rendered and materials furnished in the prosecution of the work provided for in said contract, or in any amendment or extension of or addition to said contract, then the above obligation shall be void; otherwise to remain in full force and effect. PROVIDED, however, that this bond is subject to the following conditions and limitations.

(a) All persons who have performed labor, rendered services or furnished materials or machinery as

aforesaid shall have a direct right of action against the principal and surety on this bond, which right of action shall be asserted in proceedings instituted in the State in which such labor was performed, services rendered or materials furnished (or where labor has been performed, services rendered or materials furnished under said contract in more than one State, then in any such State). Insofar as permitted by the laws of such State, such right of action shall be asserted in a proceeding instituted in the name of the Obligee to the use and benefit of the person instituting such action and of all other persons having claims hereunder, and any other person having a claim hereunder, shall have the right to be made a party to such proceeding (but not later than one year after the complete performance of said contract and final settlement thereof) and to have such claim adjudicated in such action and judgment rendered thereon.

(b) The surety shall not be liable hereunder for any damages or compensation recoverable under any workmen's compensation or employer's liability statute.

(c) In no event shall the surety be liable for a greater sum than the penalty of this bond, or subject to any suit, action or proceeding thereon that is instituted later than one year after the complete performance of said contract and final settlement thereof.

(d) As used herein: The term "person" refers to any person, firm or corporation who has furnished materials or machinery to be used on or incorporated in the work or the prosecution thereof provided for in said contract or in any amendment or extension of or addition to said contract, and/or to any person engaged in the prosecution of the work provided for in said contract or in any amendment or extension of or addition to said contract, who is an agent, servant or employee of the principal, or of any subcontractor, or of any assignee of said principal or of any sub-con-

tractor, and also anyone so engaged who performs the work of a laborer or of a mechanic regardless of any contractual relationship between the principal, or any sub-contractor, or any assignee of said principal or of said subcontractor, and such laborer or mechanic, but shall not include office employees not regularly stationed at the site of the work.

The said surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of this contract or to the work to be performed thereunder or the specifications accompanying the same, shall in any wise affect its obligations on this bond, and it does hereby waive notice of any such change, extension of time, alteration or addition to the terms of the contract or to the work or to the specifications.

SIGNED, SEALED AND DELIVERED in duplicate this 8 day of October, 1938.

(Individual Principals Sign Here)

John W. Craig, d/b/a
JOHN W. CRAIG ELECTRIC COMPANY (Seal)
JOHN W. CRAIG (Seal)

In the presence of:
RALPH J. DAVIS

(Corporate Principal Sign Here)

By THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
By THOMAS E. SPITTAL (Seal)
Attorney.

(Surety Sign Here)

Attest:

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
By THOMAS E. SPITTAL (Seal)
Attorney.

Witness:
RALPH J. DAVIS

* * * * * * *

THE FIDELITY and CASUALTY COMPANY of NEW YORK

CERTIFICATE OF ISSUANCE OF INSURANCE

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK hereby certifies that it has issued to

Assured (1) John W. Craig (2) J. W. Craig Electric Company
Address 726 Herschel St., W. E. Pittsburgh, Allegheny Co., Pa.

a policy or policies of insurance described as follows:

Policy Kind	No. Workmen's Compensation	No. F 196118 Public Liability			No.		
Term	to	10/6/38 to 5/25/39			to		
Limits of Liability	Compensation Law of States Named Below	PUBLIC LIABILITY	LIMITS OF LIABILITY		PUBLIC LIABILITY	LIMITS OF LIABILITY	
		A. BODILY INJURY LIABILITY	$50,000. each person and subject to that limit for each person $50,000. each accident		A. BODILY INJURY LIABILITY	$ each person and subject to that limit for each person $ each accident	
		B. PROPERTY DAMAGE LIABILITY	$25,000. each accident		B. PROPERTY DAMAGE LIABILITY	$ each accident	
Locations Covered		Aggregate	$25,000.				

LIMITS OF LIABILITY. The limit of bodily injury liability specified above as applicable to "each person" is the limit of the Company's liability for all damages, including damages for care and loss of services, arising out of bodily injury to or death of one person in any one accident; the limit of such liability so specified as applicable to "each accident" is, subject to the said limit for each person, the total limit of the Company's liability for all damages, including damages for care and loss of services, arising out of bodily injury to or death of two or more persons in any one accident. The limit of Property Damage Liability expressed above, is the limit of the Company's liability for all Property Damage the result of one accident.

Description of operations (Summarized)

726 Herschel St., W. E. Pittsburgh, Allegheny County, Pa., and elsewhere in the State of Penna.
Electrical Wiring—within buildings—including installation or repair of fixtures or appliances—(installation of electrical machinery or auxiliary apparatus to be separately rated.)

Plaintiff's Exhibit 566.

Notes:

Cancellation or change of the above policy shall not take effect until after 10 days notice in writing shall have first been given by the Company to the City of Pittsburgh, Pa., and also a like notice sent the assured, such notice to commence on the date notice is actually received.

This endorsement has been made a part of the original policy.

This certificate is issued at the request of City of Pittsburgh
Address Pittsburgh, Pennsylvania.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK will mail to the said address a record of any material change in or cancellation of the said policy or policies.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK
By C. J. HAMMER, Resident Manager
Countersigning Agent or Manager

Date October 6, 1938

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
STATE WORKMEN'S INSURANCE FUND
HARRISBURG

CERTIFICATE OF INSURANCE

Oct. 5, 1938

This is to certify that the assured named in the following schedule is at this date insured with the STATE WORKMEN'S INSURANCE FUND under policy described in the following schedule covering the assured obligation for compensation as imposed upon said assured by provisions of the Workmen's Compensation Act of Pennsylvania, 1915, as amended and all laws amendatory thereof which may be or become effective while this policy is in force, without any exception, qualification or limitation.

DESCRIPTIVE SCHEDULE

Assured John W. Craig Electric Co.
Address 726 Herschel St., Pittsburgh, Penna.
Description of work covered: Electric Constr.
Including all operations incidental to the work of the assured.
"In the event of cancellation of said policy by either party it is understood and agreed that the Fund will give to the holder hereof 10 days notice of such cancellation."
Policy No. 113179-B Effective 7-13-38 12:01 A. M. Expires 7-13-39

This certificate is issued at the request of
Department of Public Works
Room 430 City County Bldg.,
Whose address is Pittsburgh, Pa.

STATE WORKMEN'S INSURANCE FUND
R. E. BURKE,
Authorized Agent or
Official
Chief Underwriter.

JOHN W. CRAIG CO.
Electrical Contractors
Telephone, Walnut 1248
726 Herschel Street, Pittsburgh, Pa.

October 7, 1938

City of Pittsburgh
Dept of Public Works
Pittsburgh, Pa.

RE: BURGWIN PLAYGROUND
Electrical Contract
P. W. A. Project 1634F

Gentlemen:

You will find that we have not obtained a rider for automobile insurance.

The reason for this is that we do not own any trucks. All our material for this job will be delivered to the site by our material supply dealers.

Yours very truly,
JOHN W. CRAIG ELECTRIC CO.
JOHN W. CRAIG
Proprietor

JC/MJM

No. 388.

BILL No. 1355.

AN ORDINANCE providing for a contract or contracts to be carried out as Federal Emergency Administration of Public Works projects for certain improvements to the public highway, bridges and viaduct, sewerage, drainage, park, recreation and water systems of the City of Pittsburgh, in the Department of Public Works, and providing for the payment of the costs thereof from funds otherwise appropriated therefor.

SECTION 1. Be it ordained and enacted by the City of Pittsburgh, in Council assembled, and it is hereby

ordained and enacted by the authority of the same, That the Mayor and the Director of the Department of Public Works be and they are hereby authorized and directed to advertise for proposals, award and enter into a contract or contracts, including contracts for test holes, for making the following public improvements to the public highway, bridge and viaduct, sewerage, drainage, park, recreation and water systems of the City of Pittsburgh, in the Department of Public Works, in accordance with the laws and ordinances governing said City on improvements performed with financial aid from the Federal Emergency Administration of Public Works:—

Pa. Docket No.		Estimated Cost
	CONSTRUCTION OF RELIEF SEWERS	
1590	Homewood Avenue—	
	from Jonathan Street	
	to Kelly Street	$ 35,000.00
	Negley Run Drainage Basin—	
	on Prince Street and Burpee Street	
	from Hamilton Avenue	
	to Washington Boulevard	
	With branch	
	on Sheridan Avenue	
	from Hoeveler Street	
	to Collins Avenue	
	And Burpee Street	
	from Rodman Street	
	to Prince Street	275,000.00
	Four Mile Run and	
	Negley Run Drainage Basins—	
	Excavation of test holes	7,000.00

Pa. Docket No.		Estimated Cost
1631	Thirty-third Street Drainage Basin—	
	on North Euclid Avenue, South Euclid Avenue, Friendship Avenue, South Negley Avenue, Claybourne Street, Graham Street, Potter Street and private property from Kirkwood Street to private property of the Pennsylvania Railroad Company west of South Aiken Avenue	
	With branch sewers	
	on South Graham Street, Claybourne and Noble Street	600,000.00
	Thirty-third Street Drainage Basin—	
	Excavation of test holes	3,000.00
1970	Bates Street Drainage Basin—	
	on Coltart Avenue and Bates street from a point about 350 feet northwest of Louisa Street to Ethel Street	
	With branch sewer	
	on Forbes Street	
	from McKee Place	
	to Coltart Avenue	
	Including necessary test holes	91,000.00
	RECONSTRUCTION OF BRIDGES AND VIADUCTS	
1604	Herrs Island Bridge over back channel of Allegheny River	135,000.00
2015	Bloomfield Bridge—	
	Reconstruction of sidewalks	90,000.00

Pa. Docket No.		Estimated Cost
1996	Shady Avenue Bridge Highland Avenue Bridge— Reconstruction of floor systems	60,000.00
	GRADING, REGRADING, PAVING, REPAVING, CURBING, RECURBING AND OTHERWISE IMPROVING STREETS, AVENUES AND BOULEVARDS	
1616	Buena Vista Street from Perrysville Avenue to Armandale Street 67,000.00	
	Capital Avenue from Pioneer Avenue to West Liberty Avenue 46,000.00	
	Wedgemere Avenue from Brookline Boulevard to Rossmore Avenue 10,000.00	
	Overbrook Boulevard from Saw Mill Run Boulevard to about 232 feet west of Spokane Street 58,000.00	
	Beaver Avenue from Western Avenue to Pennsylvania Avenue 47,000.00	
	Maple Terrace from Grandview Avenue to Virginia Avenue 22,000.00	
	Total	250,000.00

Pa. Docket No.		Estimated Cost
1635	Forty-fifth Street from Butler Street to Davison Street	35,000.00
	IMPROVEMENTS TO CITY OWNED PARK AND RECREATION PROPERTIES	
1600	Schenley Park— Comfort Station	18,000.00
1612	Sophia Evert Playground #2— Bleachers and field house	45,000.00
1633	Magee Playground— Bath and Field House	80,000.00
1634	Burgwin Playground— Swimming pool and bath house	85,000.00
1649	Highland Park Zoo Remodeling	25,000.00
1987	West Penn Playground— Recreation building	150,000.00
	WALLS AND STEPS	
1599	Waldeck Street Saw Mill Run Boulevard— Construction of walls	65,000.00
	Mann Street— Construction of steps	5,000.00
	IMPROVEMENTS TO THE WATER SYSTEM	
1591	Lincoln District Allentown District Squirrel Hill District— Storage tanks including pipe line and appurtenances therefor	267,000.00
	Smallman Street Water Main Replacement between 26th Street and 36th Street	

Pa. Docket No.		Estimated Cost
	Oakland Heights Reinforcement Main	267,000.00
1601	Lampher Rising Main Encasement	86,000.00
1968	Second Avenue New Water Main from Greenfield Avenue to a point east of South 10th Street	
	Brilliant Pumping Station Rising Main	448,000.00
		$3,122,000.00

SECTION 2. For the payment of the costs of said work, the Mayor is hereby authorized and directed to issue, and the Controller to countersign, warrants in amounts not exceeding the estimated costs above respectively set forth, drawn on funds otherwise appropriated therefor.

SECTION 3. That any Ordinance or part of Ordinance, conflicting with the provisions of this Ordinance, be and the same is hereby repealed, so far as the same affects this Ordinance.

Ordained and enacted into a law in Council, this 16th day of August, A. D., 1938.

JAMES L. O'TOOLE, JR.,
President of Council

Attest: E. W. LINDSAY,
Clerk of Council

Mayor's Office August 22, 1938.

Approved: CORNELIUS D. SCULLY,
Mayor.

Attest: HOMER C. WADSWORTH,
Mayor's Asst. Secretary

Recorded in Ordinance Book, Vol. 49, Page 165, 22nd day of August, 1938.

Pittsburgh, August 29, 1938.

I do hereby certify that the foregoing is a true and correct copy of Ordinance No. 388, Series 1938, as the same appears of record in the office of the City Clerk.

JAMES W. PATTERSON,

[SEAL] *Asst. City Clerk.*

Defendants' Exhibit "A".

THE STANDARD FORM OF AGREEMENT BETWEEN OWNER AND ARCHITECT

Issued by the American Institute of Architects for use when a percentage of the cost of the work forms the basis of payment.

Third Edition—Copyright 1917-1926 by the American Institute of Architects Washington, D. C.

THIS AGREEMENT made the 24th day of May in the year Nineteen Hundred and Thirty-Seven by and between THE BOROUGH OF CRAFTON hereinafter called the Owner, and V. J. SCHOENEMAN AND H. L. CARTER hereinafter called the Architects,

WITNESSETH, that whereas the Owner intends to erect A MUNICIPAL BUILDING

NOW, THEREFORE, the Owner and the Architect, for the considerations hereinafter named, agree as follows:

The Architect agrees to perform, for the above-named work, professional services as hereinafter set forth.

The Owner agrees to pay the Architect for such services a fee of Six (6) per cent of the cost of the work, with other payments and reimbursements as hereinafter provided, the said percentage being hereinafter referred to as the "basic rate."

The parties hereto further agree to the following conditions:

1. *The Architect's Services.*—The Architect's professional services consist of the necessary conferences, the preparation of preliminary studies, working drawings, specifications, large scale and full size detail drawings; the drafting of forms of proposals and contracts; the issuance of certificates of payment; the keeping of accounts, the general administration of the business and supervision of the work.

* * * * * * *

7. *Supervision of the Work.*—The Architect will endeavor to guard the Owner against defects and deficiencies in the work of contractors, but he does not guarantee the performance of their contracts. The supervision of an Architect is to be distinguished from the continuous personal superintendence to be obtained by the employment of a clerk-of-the-works.

When authorized by the owner, a clerk-of-the-works acceptable to both Owner and Architect shall be engaged by the Architect at a salary satisfactory to the Owner and paid by the Owner, upon presentation of the Architect's monthly statements.

8. *Preliminary Estimates.*—When requested to do so the Architect will furnish preliminary estimates on the cost of the work, but he does not guarantee the accuracy of such estimates.

* * * * * * *

The Owner and the Architect hereby agree to the full performance of the covenants contained herein.

IN WITNESS WHEREOF they have executed this agreement, the day and year first above written.

W. S. GUY
President, Crafton Borough Council.
VINCENT J. SCHOENEMAN
H. L. CARTER
Architects.

Attest:
WM. A. ENGLAND
Secretary Crafton Borough.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

United States

v.

Hess & Barton, a Pa. Corp., William F. Hess, Edward B. Sargent, Robt. N. Morris, Lord Electric Co., a Delaware Corp., John R. Williams, Walter F. Weberg, J. R. Walters, Franklin Electric & Construction Co., a Pa. Corp., Thomas G. Hodgdon, Thomas G. Hodgdon, Jr., Benj. Raphael, Israel Raphael, Iron City Engineering Co., a Pa. Corp., C. W. Ridinger, Jr., C. W. Ridinger, Sr., Warren I. Bickford, Carter Electric Co., a Pa. Corp., Edwin C. Carter, Craig Electric Co., a Pa. Corp., James V. Burke, G. L. Craig Electric Co., a Pa. Corp., G. L. Craig, Wm. S. Taczanowsky, Chas. M. Cronenweth, John E. Hale, Wm. C. Hemmerle, Morganstern Electric Co., Inc., a Pa. Corp., Ralph M. Morganstern, Daniels Electric Construction Co., a Pa. Corp., Max Daniels, James C. Devlin, Norman B. Leeke, Herbert D. Hale, MacNeil Electric Co., a Pa. Corp., Alvin S. MacNeil, Robt. B. Yates, Winfield S. Martin, M. J. Murray, James A. Rodden, Donald R. Ross, Richard W. Schindler, Star Electric & Construction Co., a Pa. Corp., Walter C. Gloekler, James H. Stauffer, K. K. Wood, Industrial Electric Co., a Pa. Corp., H. L. Fullerton, Louis H. Berkman, John W. Craig, R. G. Diodati, Irwin J. Levinson, Bernard A. Ross, Electrical Contractors Assn. of Pgh., a Pa. Corp., Robert C. Carmack, Michael P. Gordon, William G. Shord, and John Bradley.

No. 10462
Criminal
Docket

Excerpts From Docket Entries.

1939	
Nov. 3	True Bill
" "	Indictment filed
Jan. 5, 1940	Defendants Benj. Raphael; Israel Raphael; Iron City Engineering Co. by its president; Charles W. Ridinger, Jr.; Chas. W. Ridinger, Sr.; Warren I. Bickford; Craig Electric Co. by its president; James V. Burke; Chas. M. Cronenweth; Morganstern Electric Co. by its president; Ralph W. Morganstern; Herbert D. Hale; Winfield S. Martin; Michael J. Murray; James A. Rodden; Donald R. Ross; Richard W. Schindler; Star Electric & Construction Co. by its president; Walter G. Gloekler; James H. Stauffer; K. K. Wood; Louis H. Berkman; John W. Craig and Irwin J. Levinson plead nolo contendere.
Jan. 5, 1940	The following defendants change their pleas to nolo contendere; Hess & Barton by its president; Wm. D. Hess; Edw. B. Sargent; Robt. N. Morris; Lord Electric Co. by its vice-president and John R. Williams; Walter F. Weberg; Franklin Electric & Construction Co. by its president; Wm. G. Hodgdon; Wm. G. Hodgdon, Jr.; Carter Electric Co. by its president; Edwin C. Carter; G. L. Craig; G. L. Craig Electric Co. by its sec-treas.; Wm. H. Taczanowsky; John E. Hale; Wm. C. Hemmerle; Max Daniels; Daniels Electric Construction Co., by its president; James C. Devlin; Norman B. Leeke; MacNeil Electric Co., by its president; Alvin S. MacNeil; Robt. B. Yates; Industrial Electric

Co., by its president; H. L. Fullerton; Louis H. Berkman; R. G. Diodati; Bernard A. Ross; Electrical Contractors Assn. of Pgh., by its president; Robt. C. Carmack; Michael P. Gordon; and Wm. G. Shord.

Feb. 6 The sentence of the court is that Iron City Engineering Co. pay a fine of $1000.—no costs (S)

" " The sentence of the court is that Walter C. Gloekler pay a fine of $250—no costs (S)

" " The sentence of the court is that James V. Burke pay a fine of $500—no costs (S)

" " The sentence of the court is that Donald R. Ross pay a fine of $500—no costs (S)

" " The sentence of the court is that James A. Rodden pay a fine of $500—no costs (S)

" " The sentence of the court is that K. K. Wood pay a fine of $500—no costs (S)

" " The sentence of the court is that Irwin J. Levinson pay a fine of $250—no costs (S)

" " The sentence of the court is that John R. Williams pay a fine of $1000—no costs (S)

" " The sentence of the court is that G. L. Craig Electric Co. pay a fine of $500—no costs (S)

" " The sentence of the court is that Wm. F. Hess pay a fine of $5000—no costs (S)

" " The sentence of the court is that Chas. M. Cronenweth pay a fine of $1000—no costs (S)

" " The sentence of the court is that Edw. B. Sargent pay a fine of $3000—no costs (S)

" " The sentence of the court is that Norman B. Leeke pay a fine of $500—no costs (S)

" " The sentence of the court is that Wm.

C. Hemmerle pay a fine of $1000—no costs (S)

Feb. 6, 1940

" " The sentence of the court is that John W. Craig pay a fine of $250—no costs (S)

" " The sentence of the court is that Israel Raphael pay a fine of $200—no costs (S)

" " The sentence of the court is that Benjamin Raphael pay a fine of $1000.—no costs (S)

" " The sentence of the court is that Star Electric & Construction Co. pay a fine of $250—no costs (S)

" " The sentence of the court is that H. L. Fullerton pay a fine of $250—no costs (S)

" " The sentence of the court is that Industrial Electric Co. pay a fine of $250—no costs (S)

" " The sentence of the court is that John E. Hale pay a fine of $1000—no costs (S)

" " The sentence of the court is that Morganstern Electric Co. pay a fine of $500—no costs (S)

" " The sentence of the court is that Thomas G. Hodgdon, Jr. pay a fine of $500—no costs (S)

" " The sentence of the court is that Thomas G. Hodgdon pay a fine of $500—no costs (S)

" " The sentence of the court is that Franklin Electric & Construction Co. pay a fine of $1000—no costs (S)

" " The sentence of the court is that Ralph M. Morganstern pay a fine of $500—no costs (S)

" " The sentence of the court is that Daniels

Electric Construction Co. pay a fine of $250—no costs (S)

Feb. 6, 1940 The sentence of the court is that Max Daniels pay a fine of $250—no costs (S)

" " The sentence of the court is that Herbert D. Hale pay a fine of $500—no costs (S)

" " The sentence of the court is that Hess & Barton pay a fine of $2000—no costs (S)

" " The sentence of the court is that Robt. N. Morris pay a fine of $3000—no costs (S)

" " The sentence of the court is that Wm. S. Taczanowsky pay a fine of $100 — no costs (S)

" " The sentence of the court is that Lord Electric Co. pay a fine of $2000 — no costs (S)

" " The sentence of the court is that Louis H. Berkman pay a fine of $250—no costs (S)

" " The sentence of the court is that James H. Stauffer pay a fine of $500—no costs (S)

" " The sentence of the court is that Richard W. Schindler pay a fine of $500 — no costs (S)

" " The sentence of the court is that M. J. Murray pay a fine of $250—no costs (S)

" " The sentence of the court is that Warren I. Bickford pay a fine of $100—no costs (S)

" " The sentence of the court is that C. W. Ridinger, Sr., pay a fine of $100 — no costs (S)

" " The sentence of the court is that C. W. Ridinger, Jr., pay a fine of $500 — no costs (S)

" " The sentence of the court is that R. G. Diodati pay a fine of $250—no costs (S)

" " The sentence of the court is that Craig

Electric Co. pay a fine of $500 — no costs (S)

Feb. 6, 1940 The sentence of the court is that Edwin C. Carter pay a fine of $500—no costs (S)

" " The sentence of the court is that G. L. Craig pay a fine of $400—no costs (S)

" " The sentence of the court is that Robert B. Yates pay a fine of $50—no costs (S)

" " The sentence of the court is that MacNeil Electric Co. pay a fine of $250 — no costs (S)

" " The sentence of the court is that Alvin S. MacNeil pay a fine of $200—no costs (S)

" " The sentence of the court is that Carter Electric Co. pay a fine of $500 — no costs (S)

" " The sentence of the court is that James Devlin pay a fine of $500—no costs (S)

" " The sentence of the court is that Bernard A. Ross pay a fine of $250—no costs (S)

" " Final commitments issued

" " Final commitments returned not executed, defendants having paid fines as follows: Morganstern Electric Co., John E. Hale; Industrial Electric Co., H. L. Fullerton; Norman B. Leeke, Edw. B. Sargent; Chas. M. Cronenweth; Wm. F. Hess; G. L. Craig Electric Co.; C. W. Ridinger, Jr., John R. Williams; MacNeil Electric Co.; Alvin S. MacNeil; Robt. B. Yates; G. L. Craig; Edwin C. Carter; Craig Electric Co.; Thos. G. Hodgdon, Jr.; James V. Burke; R. G. Diodati; Max Daniels; Daniels Electric Construction Co.; Ralph M. Morganstern; Franklin Electric & Construction Co., Thomas G. Hodgdon.

Feb. 7, 1940	Final commitments returned not executed as to the following defendants, they having paid their fines: Hess & Barton; Wm. C. Hemmerle, Irwin J. Levinson, K. K. Wood, James A. Rodden, Michael P. Gordon, Walter C. Gloekler, James C. Devlin, Bernard A. Ross, Carter Electric Co., D. R. Ross, M. J. Murray, Herbert D. Hale, Warren I. Bickford, Wm. S. Taczanowsky, Lord Electric Co., Louis H. Berkman, James H. Stauffer, Iron City Engineering Co., Israel Raphael, Wm. G. Shord, Robert N. Morris, C. W. Ridinger, Sr., Star Electric & Construction Co., Richard W. Schindler, John W. Craig, Benjamin Raphael.
" 8	The sentence of the court is that J. R. Walters pay a fine of $500—no costs (S)
" "	The sentence of the court is that Walter F. Weberg pay a fine of $1000 — no costs (S)
" "	Final commitments issued
" "	Final commitments returned not executed, defendants having paid fines.
" 6	The sentence of the court is that Winfield S. Martin pay a fine of $250—no costs (S)
" "	Final commitment issued
" 13	Final commitments returned as defendants paid fine for the following: W. S. Martin, Electrical Contractors Assn. of Pgh. and Robt. C. Carmack.

Indictment.

No. 10,462 Criminal

Filed November 3, 1939.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In the May Term 1939.

The Grand Jurors of the United States of America, duly impaneled, sworn and charged to inquire of crimes and offenses within the body of the Western District of Pennsylvania and so inquiring, upon their oaths present:

1. That during all of the time hereinafter mentioned, the Electrical Contractors Association of Pittsburgh, Inc., was a Pennsylvania corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania, with its principal place of business at Pittsburgh, Pennsylvania;

2. That during all or a part of the time hereinafter mentioned, the following named persons were engaged in the business of electrical contracting, carrying on business in and about Pittsburgh, Pennsylvania, that is to say;

That William F. Hess was President of Hess and Barton; Edward B. Sargent was owner of Sargent Engineering Company; Robert N. Morris was owner of Morris Engineering Company; John R. Williams was Vice President of Lord Electric Company; Walter F. Weberg and J. R. Walter were partners doing business as Fort Pitt Electric Company; Thomas G. Hodgdon was President, and Thomas G. Hodgdon, Jr., was Secretary of Franklin Electric & Construction Company; Benjamin Raphael and Israel Raphael were partners doing business as Raphael Electric Company; C. W. Ridinger, Sr. was President, Warren I. Bickford was Secretary and Treasurer, and C. W. Ridinger, Jr., was Manager of the

Iron City Engineering Company; Edwin C. Carter was President of Carter Electric Company; James V. Burke was President of Craig Electric Company; G. L. Craig was Secretary and William S. Taczanowsky was President of G. L. Craig Electric Company; Charles M. Cronenweth was owner of Cronenweth Electric Company; John E. Hale was owner of Hale Electric Company; William C. Hemmerle was owner of W. C. Hemmerle Electric Company; Ralph M. Morganstern was President of Morganstern Electric Company, Inc.; Max Daniels was President of Daniels Electric Construction Company; James C. Devlin was owner of Devlin Electric Construction Company; Norman B. Leeke was owner of Diamond Electric Company; Herbert D. Hale was owner of H. D. Hale Electric Company; Alvin S. MacNeil was President and Robert B. Yates was Vice President of MacNeil Electric Company; Winfield S. Martin and M. J. Murray were partners doing business as Martin and Murray; James A. Rodden was owner of Rodden Electric Company; Donald R. Ross was owner of D. R. Ross Electric Company; Richard W. Schindler was owner of R. W. Schindler Electric Company; Walter C. Gloekler was President of Star Electric & Construction Company; James H. Stauffer was owner of Stauffer Electric Company; K. K. Wood operated as an electrical contractor under his own name; H. L. Fullerton was President of Industrial Electric Company; Louis H. Berkman operated as an electrical contractor under his own name; John W. Craig was owner of J. W. Craig Electric Company; R. G. Diodati was owner of R. G. Diodati and Bro.; Irwin J. Levinson was owner of Levinson Electric Company; Bernard A. Ross was owner of Ross Electric Company; and were members of said Electrical Contractors' Association of Pittsburgh, Inc.;

3. That William F. Hess, President of said Electrical Contractors' Association of Pittsburgh, Inc. and Rob-

ert C. Carmack, Manager thereof, were active in the direction of said Association's affairs;

4. That Local Union Number 5, International Brotherhood of Electrical Workers is an unincorporated labor union and association, chartered by and operating under the jurisdiction of the International Brotherhood of Electrical Workers of America, and that John Bradley, President; Michael P. Gordon, Business Manager and William G. Shord, Financial Secretary, of said Local Union Number 5, are active in the management and direction of its affairs;

5. That for the purposes of relieving destitution, providing relief, creating and increasing employment, expediting a Public Works program and providing for work upon and construction of useful Public Works and projects, the Congress of the United States enacted the following named Acts and Joint Resolutions, to wit:

The Emergency Relief and Construction Act of 1932 (47 Statutes at Large, 709) approved July 21, 1932; The Federal Emergency Relief Act of 1933 (48 Statutes at Large, 55) approved May 12, 1933; The National Industrial Recovery Act (48 Statutes at Large, 195) approved June 16, 1933; The Emergency Relief Appropriation Act of 1935 (49 Statutes at Large, 115) approved April 8, 1935; The Emergency Relief Appropriation Act of 1936 (49 Statutes at Large, 1608) approved June 22, 1936; The Emergency Relief Appropriation Act of 1937 (50 Statutes at Large, 352) approved June 29, 1937; The Public Works Administration Extension Act of 1937 (50 Statutes at Large, 357) approved June 29, 1937; The Work Relief and Public Works Appropriation Act of 1938 (52 Statutes at Large, 809) approved June 21, 1938;

And pursuant to such Acts and Resolutions and to the orders and rules promulgated under their authority, certain sums of money were appropriated for the purposes declared in such Acts and Resolutions, and out of

said sums of money there were allocated certain sums of money to aid in the alteration, repair and construction of buildings for public schools, hospitals, playgrounds and other similar construction projects in and about the City of Pittsburgh and the County of Allegheny in the Western District of Pennsylvania, which projects, by names and descriptions so far as they are known to your Grand Jurors are:

Here follows a list of projects identical with that contained in Exhibit A to the Complaint printed at Appendix pages 21-32, except that instead of the Municipal Hospital there is included the Highland Park Bridge, Pa. 2976 Contract 406, the awarding authority, sponsor and owner of which was the Allegheny County Authority, a Pennsylvania corporation, for which there was a loan from the PWA of $990,000 and a grant of $1,836,000.

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6. That for the purpose of aiding each of said projects, a grant of money not to exceed the amount set opposite the name and description of each project in Paragraph 5 above was made by the United States of America through the Federal Emergency Administration of Public Works (commonly referred to as the Public Works Administration) to the owner (sponsor, awarding authority) whose name appears opposite the name and description of each project in Paragraph 5 above;

7. That for the purpose of letting the contracts for the electrical work, and other work in connection with said projects, and each of them, the awarding authority of each such project, sometimes herein also referred to as the "owner" or as the "sponsor", theretofore advertised and called for bids from persons seeking to obtain electrical and other contracts for the performance of the work called for by said projects;

8. That,

Hess and Barton, a Pennsylvania Corporation
William F. Hess
Edward B. Sargent
Robert N. Morris
Lord Electric Company, a Delaware Corporation
John R. Williams
Walter F. Weberg
J. R. Walter
Franklin Electric & Construction Company, a Pennsylvania Corporation
Thomas G. Hodgdon
Thomas G. Hodgdon, Jr.
Benjamin Raphael
Israel Raphael
Iron City Engineering Company, a Pennsylvania Corporation
C. W. Ridinger, Jr.
C. W. Ridinger, Sr.
Warren I. Bickford
Carter Electric Company, a Pennsylvania Corporation
Edwin C. Carter
Craig Electric Company, a Pennsylvania Corporation
James V. Burke
G. L. Craig Electric Company, a Pennsylvania Corporation
G. L. Craig
William S. Taczanowsky
Charles M. Cronenweth
John E. Hale
William C. Hemmerle
Morganstern Electric Company, Inc., a Pennsylvania Corporation
Ralph M. Morganstern

Daniels Electric Construction Company, a Pennsylvania Corporation
Max Daniels
James C. Devlin
Norman B. Leeke
Herbert D. Hale
MacNeil Electric Company, a Pennsylvania Corporation
Alvin S. MacNeil
Robert B. Yates
Winfield S. Martin
M. J. Murray
James A. Rodden
Donald R. Ross
Richard W. Schindler
Star Electric & Construction Company, a Pennsylvania Corporation
Walter C. Gloekler
James H. Stauffer
K. K. Wood
Industrial Electric Company, a Pennsylvania Corporation
H. L. Fullerton
Louis H. Berkman
John W. Craig
R. G. Diodati
Irwin J. Levinson
Bernard A. Ross
Electrical Contractors Association of Pittsburgh, Inc., a Pennsylvania Corporation
Robert C. Carmack
Michael F. Gordan
William G. Shord
John Bradley

hereinafter sometimes referred to as the Defendants, throughout a period of time beginning on or about the

first day of January in the year of our Lord one thousand nine hundred and thirty-five and continuing each and every day thereafter until the return of this indictment into this Court, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, and within the jurisdiction of this Court, did knowingly, willfully, unlawfully and feloniously conspire, combine, confederate, agree and have a tacit understanding together and with each other and with divers other persons unknown to your Grand Jurors to defraud the United States, that is to say;

9. That, while keeping up an appearance of competition and conveying to awarding authorities the idea and belief that said Defendant Electrical Contractors were rival bidders, the Defendants agreed that they would abate honest rivalry, avoid and prevent competition, deceive the awarding authorities, prevent transmission to awarding authorities of bids and, in effect, secure in advance the awarding of contracts to one of the Defendant Electrical Contractors selected by them; and so defeat the plain intent and purposes of said Acts and Resolutions and defraud the United States, all to the mutual profit of the Defendants, the injury and damage of the United States, the selfish destruction of the public interest and the impairment of governmental functions and the discredit of public officials;

That on numerous occasions, the exact numbers and dates of which are unknown to your Grand Jurors, the Defendant Electrical Contractors would each prepare his separate bid for electrical work on that one of the projects described in Paragraph 5 hereof on which bids were then being invited and they would and they did all meet together in and at the offices of said Association in the Union Trust Building in Pittsburgh, Pennsylvania, and thereupon each would and did disclose to all present, the amount of his proposed bid, an average of the proposed bid price would be obtained and the bidder

whose bid price was nearest the average would be selected as the person to submit the low bid to the awarding authority, whereupon all other Defendant Electrical Contractors desiring to bid would so adjust their bid figures and amounts as to make the bid of the person so selected the lowest;

That on other numerous occasions, the exact numbers and dates of which are unknown to your Grand Jurors, said Defendant Electrical Contractors desiring to bid on electrical work on that one of the projects described in Paragraph 5 hereof, for which bids were then being invited would and they did transmit their intended bids, by mail or otherwise, to said Association at its offices aforesaid where, on some occasions, the numbers and dates of which are unknown to your Grand Jurors, Defendant Robert C. Carmack would and he did either average said bids and choose, select and appoint the person who was to thereafter submit the low bid to the awarding authority, or a committee of members of said Association, whose names are unknown to your Grand Jurors would and they did choose, select and appoint the person who was to submit the low bid to the awarding authority;

That on other numerous occasions, the exact numbers and dates of which are unknown to your Grand Jurors, said Defendant Electrical Contractors desiring to bid on electrical work on that one of the projects described in Paragraph 5 hereof, for which bids were then being invited would and they did meet at the William Penn Hotel or the Roosevelt Hotel or the Fort Pitt Hotel in Pittsburgh, Pennsylvania and agree amongst themselves as to who should submit the low bid;

And it was further part of said conspiracy that, after making such selection by whatever method used, and in order to effectuate the same and procure the awards of contracts to the person chosen, selected and appointed, the Defendant Electrical Contractors would

and they did alter, change, decrease, increase, and adjust their proposed bid prices in such manner as that, when said Defendant Electrical Contractors thereafter submitted their bids to the awarding authority, that of the person theretofore so selected, chosen and appointed would be the lowest of all those submitted;

And it was a further part of said conspiracy that Defendants William F. Hess, Robert C. Carmack, John Bradley, Michael P. Gordan, and William G. Shord, by intimidation, by bribes and offers of bribes, by threatening to call strikes, by calling strikes, by imposition of fines and penalties and by threats of present and future injury to business would and they did seek to prevent and prevent non members of said Electrical Contractors Association of Pittsburgh, Inc. from transmitting or submitting any bids to the awarding authority and would and they did seek to prevent and prevent members thereof from submitting or transmitting bids to the awarding authority other than by the manners and means hereinbefore in Paragraph 9 fully described;

10. And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that the said Defendants, and each of them did so willfully, unlawfully, corruptly and feloniously conspire, combine, confederate, agree and have a tacit understanding that they would;

(a) defraud the United States of large sums of money, the exact amounts of which are unknown to your Grand Jurors, but being up to 45% of the difference between the prices and amounts which would have been bid except for the existence of said conspiracy and the prices and amounts actually bid by said conspirators;

(b) defraud the United States by avoiding and preventing competitive bidding, deceiving awarding authorities charged with making awards, in effect securing in advance the awarding of contracts to one of Defend-

ants selected by them on Federal Aid Projects and so defeating the plain intent and purpose of the Acts and Resolutions of Congress hereinbefore enumerated and impairing the governmental functions of the Department of the Interior and of the Federal Emergency Administration of Public Works (commonly referred to as the Public Works Administration), an agency of the United States;

11. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and find that certain of the said Defendants herein designated, at the several times and places hereinafter mentioned did perform divers overt acts, each of which was done in pursuance of, in execution of and to effect, employ and accomplish the objects, designs and purposes of the said willful, unlawful, corrupt and felonious conspiracy, combination, confederation, agreement and understanding, some, but not all of which overt acts were;

OVERT ACTS

1.

That on or about the 22nd day of December, 1938, the defendant, William F. Hess, submitted to Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical contract on the South Vocational High School, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

2.

That on or about the 6th day of February, 1938, the defendant, Edward B. Sargent, prior to the official bid opening, attended a meeting of interested bidders for an electrical contract on the Western Penitentiary, Pittsburgh, Pennsylvania, and discussed and arrived at

the figure which he used in bidding on said project, pursuant to the association procedure described.

3.

That on or about the 6th day of December, 1938, the defendant, Robert N. Morris, submitted to the School District of the Borough of West View, Allegheny County, Pennsylvania, a bid for an electrical contract on the West View High School, West View, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

4.

That on or about the 27th day of June, 1939, the defendant, John R. Williams, submitted to the City of Pittsburgh, Allegheny County, Pennsylvania, a bid for an electrical contract on the Leech Farm Tuberculosis Sanitarium, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

5.

That on or about the 20th day of October, 1938, the defendant, Walter F. Weberg, submitted to the School District of the Township of Mifflin, Allegheny County, Pennsylvania, a bid for an electrical contract on the Homeville Junior High School, Mifflin Township, Allegheny County, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

6.

That on or about the 1st day of September, 1938, the defendant, Thomas G. Hodgdon, submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical con-

tract on the Schiller Elementary School, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

7.

That on or about the 8th day of August, 1938, the defendant, Benjamin Raphael, submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical contract, on the Crescent Elementary School, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

8.

That on or about the 11th day of August, 1938, the defendant, C. W. Ridinger, Sr., signed and submitted to the Board of County Commissioners, Allegheny County Court House, Pittsburgh, Pennsylvania, a bid for an electrical contract on the Highland Park Bridge, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

9.

That on or about the 11th day of August, 1938, and prior to the official bid opening, the defendant, C. W. Ridinger, Jr., on behalf of defendant, C. W. Ridinger, Sr., submitted a cost estimate to, and obtained a bidding price from a meeting of members of the said Association interested in submitting bids for an electrical contract on the Highland Park Bridge, Pittsburgh, Pennsylvania.

10.

That on or about the 20th day of July, 1938, the defendant, Edwin C. Carter, submitted to the Board of

Public Education of the School District of Pittsburgh Pennsylvania, a bid for an electrical contract on the Whittier Elementary School, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

11.

That on or about the 18th day of November, 1938, the defendant, James V. Burke, submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical contract on the Spring Garden Elementary School, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

12.

That on or about the 16th day of September, 1938, the defendant, G. L. Craig, submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical contract on the Concord Elementary School of Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

13.

That on or about the 16th day of September, 1938, the defendant, William Taczanowsky, signed and submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical contract on the Concord Elementary School of Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

14.

That on or about the 16th day of September, 1938, and prior to the official bid opening, the defendant, G. L. Craig, submitted a cost estimate to and obtained a bidding figure from the office of the said Association, which figure was used in the proposal submitted for an electrical contract on the Concord Elementary School of Pittsburgh, Pennsylvania.

15.

That on or about the 18th day of August, 1938, the defendant, Charles M. Croneweth, submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical contract on the Arsenal Elementary School, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

16.

That on or about the 8th day of February, 1938, the defendant, John E. Hale, submitted to the General State Authority, Harrisburg, Pennsylvania, a bid for an electrical contract on the Western Penitentiary, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

17.

That on or about the 8th day of August, 1938, the defendant, William C. Hemmerle, submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical contract on the Crescent Elementary School of Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

18.

That on or about the 18th day of October, 1938, the defendant, Ralph M. Morganstern, submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical contract on the Girls Vocational High School, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

19.

That on or about the 18th day of October, 1938, the defendant, Max Daniels, submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical contract on the Girls Vocational High School, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

20.

That on or about the 21st day of July, 1939, the defendant, James C. Devlin, submitted to the City of Pittsburgh a bid for an electrical contract on the West Penn Playground, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

21.

That on or about the 20th day of October, 1938, the defendant, Norman B. Leeke, submitted to the School District of the Township of Mifflin, Allegheny County, Pennsylvania, a bid for an electrical contract on the Homeville Junior High School, Homeville, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

22.

That on or about the 21st day of July, 1939, the defendant Herbert D. Hale, submitted to the City of Pittsburgh, a bid for an electrical contract on the Field House, Cowley-Goettman Playground, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

23.

That on or about the 9th day of March, 1939, the defendant, Alvin S. MacNeil, submitted to the Board of County Commissioners, Allegheny County Court House, Pittsburgh, Pennsylvania, a bid for an electrical contract on the Traffic Grade Separation, East Ohio Street, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

24.

That on or about the 8th day of November, 1938, the defendant, Winfield S. Martin, submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical contract on the Miller Elementary School of Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

25.

That on or about the 26th day of September, 1938, the defendant, James A. Rodden, submitted to the School District of the City of McKeesport, Allegheny County, Pennsylvania, a bid for an electrical contract on The East End Elementary School, McKeesport, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

26.

That on or about the 25th day of June, 1937, the defendant, Donald R. Ross, submitted to the Borough of Braddock, a bid for an electrical contract on the Filtration Plant, Braddock, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

27.

That on or about the 18th day of January, 1939, the defendant, Richard W. Schindler, submitted to the School District of the Borough of Bridgeville, Allegheny County, Pennsylvania, a bid for an electrical contract on the Lincoln and Washington School Buildings, Bridgeville, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

28.

That on or about the 28th day of October, 1938, the defendant, Walter C. Gloekler, submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical contract on the West Liberty Elementary School, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

29.

That on or about the 28th day of October, 1938, the defendant, James H. Stauffer, submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical contract on the West Liberty Elementary School, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

30.

That on or about the 7th day of November, 1938, the defendant, H. L. Fullerton, submitted to the Ross Township, School District, Pennsylvania, a bid for an electrical contract on the Siebert School, Bellevue, Allegheny County, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

31.

That on or about the 16th day of September, 1938, the defendant, K. K. Wood, submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical contract on the Concord Elementary School, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

32.

That on or about the 3rd day of November, 1938, the defendant, Louis H. Berkman, submitted to the City of Pittsburgh, a bid for an electrical contract on the Field House, McGee Playground, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

33.

That on or about the 3rd day of October, 1938, the defendant, John W. Craig, submitted to the City of Pittsburgh, a bid for an electrical contract on the Swimming Pool, Burgwin Playground, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

34.

That on or about the 3rd day of November, 1938, the defendant, R. G. Diodati, submitted to the City of Pittsburgh, a bid for an electrical contract on the Field House, McGee Playground, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

35.

That on or about the 29th day of August, 1938, the defendant, Irwin J. Levinson, submitted to the Borough of Blawnox, Pennsylvania, a bid for an electrical contract on the Municipal Building, Blawnox, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

36.

That on or about the 19th day of November, 1936, the defendant, Bernard A. Ross, submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical contract on the Prospect Junior High School, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

37.

That on or about the 27th day of June, 1939, the defendant, J. R. Walter, signed a bid for an electrical contract on the Leech Farm Tuberculosis Sanitarium, Pittsburgh, Pennsylvania, submitted to the City of Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

38.

That on or about the 8th day of August, 1938, the defendant, Israel Raphael, signed and submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, a bid for an electrical contract on the Crescent Elementary School, Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

39.

That on or about the 18th day of March, 1938, the defendant, Robert B. Yates, signed a bid for an electrical contract on the Filter Houses at the Kline, Arlington and Paulson Swimming Pools, Pittsburgh, Pennsylvania, submitted to the City of Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

40.

That on or about the 1st day of September, 1938, the defendant, M. J. Murray, signed a bid for an electrical contract on the Schiller Elementary School, Pittsburgh, Pennsylvania, submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, containing a price which was not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

41.

That on or about the 1st day of September, 1938, the defendant, Thomas G. Hodgdon, Jr., signed a bid for an electrical contract on the Schiller Elementary School, Pittsburgh, Pennsylvania, submitted to the Board of Public Education of the School District of Pittsburgh, Pennsylvania, containing a price which was

not bona fide but had been arrived at through the unlawful association procedure hereinbefore described.

42.

That on or about the 1st day of September, 1938, the defendant, Robert C. Carmack, prior to the official bid opening, notified each proposed bidder for an electrical contract on the Schiller Elementary School, Pittsburgh, Pennsylvania, by handing each of them a slip of paper containing a price, or otherwise notified each of them, of the price each was to submit at the official bid opening for said electrical contract.

43.

That on or about January 1, 1939, the defendant, Michael P. Gordon, was present at a meeting of the members of the Electrical Contractors Association of Pittsburgh, Inc., at the William Penn Hotel, Pittsburgh, Pennsylvania, at which time he informed those present that they should cooperate with each other and carry out their understandings, and stated that he would police the industry.

44.

That on or about the 1st day of July, 1939, the defendant, William G. Shord, caused the defendant, William F. Hess to come to the office of the former in Pittsburgh, Pennsylvania, to explain the membership requirements of the Electrical Contractors Association of Pittsburgh, Inc. to an independent electrical contractor.

45.

That on or about the 27th day of June, 1939, defendant, William G. Shord, called a strike on the Arsenal Elementary School on work of a contractor who had not complied with the understanding hereinbefore described in reference to the association bidding procedure.

Contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the United States.
A true bill:

G. W. SHAFFER,
Foreman.

GEORGE MASHANK,
Acting United States Attorney.

M. NEIL ANDREWS,
PERRY WATZMAN,
R. MCDONALD GRAY,
Special Assistants to the Attorney General.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

The United States v. Franklin Electric & Construction Co., a Pa. Corp., and Thomas G. Hodgdon	No. 10463 Criminal Dkt.

Excerpts From Docket Entries.

1939	
Nov. 6,	True Bill
" "	Indictment filed
1940	
Feb. 15	Motion and Order for nolle pros. filed
" "	Nolle pros. is hereby entered

G. H. Berger,
Clerk.

Indictment.

No. 10,463 Criminal.

Filed November 6, 1939.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Of May Term, A. D. 1939

Western District of Pennsylvania, ss:

The Grand Jurors of the United States of America, duly impaneled, sworn and charged to inquire of crimes and offenses within and for the body of Western District of Pennsylvania, and so inquiring, upon their oaths, present:

1. That heretofore, to wit, on or about the 22nd. day of December, in the year of our Lord, one thousand nine hundred and thirty-eight at P..tsburgh, Pa., in the County of Allegheny, in the Western District of Pennsylvania, and within the jurisdiction of this Court, Franklin Electric & Construction Company, a Pennsylvania Corporation and Thomas G. Hodgdon and hereafter referred to as the defendant, did knowingly, wilfully and feloniously make, use and cause to be made and used, a certain false certificate knowing the same to contain fraudulent and fictitious statements in a matter within the jurisdiction of a Department and Agency of the United States, that is to say:

2. The Department and Agency of the Government of the United States was the Federal Emergency Administration of Public Works (commonly known as the Public Works Administration and hereafter so referred to), created and existing by virtue of the provisions of Title II of the National Industrial Recovery Act (Sections 201, et seq.; 40 U. S. C. A., Sec. 401, et seq.), and the Rules and Orders promulgated under the authority thereof;

3. Said Public Works Administration financed in part, through grant of funds of said Department, construction of a civilian project known as Federal Public Works Project, No. Docket Pa. 1907-F more particularly known as South Vocational High School and a public building in Pittsburgh, Pa. which athletic field construction was also financed in part, by funds made available by the Board of Public Education of the School District of Pittsburgh, Pa.

4. The partial financing of the construction of said public building and property and the actual construction thereof were matters within the jurisdiction of said Public Works Administration, an Agency and Department of the United States;

5. On or about the 22nd day of December, in the year of our Lord, one thousand nine hundred and thirty-eight, said Board of Public Education of the School District, Pittsburgh, Pa., hereinafter referred to as the Awarding Authority, invited sealed Proposals (bids) containing certification that said Proposal was genuine and not sham or collusive, for general construction, heating and ventilating, electrical and other contracts in connection with the construction of said public building and property;

6. On or about the 22nd day of December in the year of our Lord, one thousand nine hundred and thirty-eight

Franklin Electric & Construction Company,
a Pennsylvania Corporation and
Thomas G. Hodgdon

the defendant aforesaid (sic.), response to said invitation submitted to said Board of Public Education of the School District, Pittsburgh, Pa., in said Western District of Pennsylvania, their written Proposal (bid) for the electrical work for said South Vocational High School and Athletic Field, and in connection therewith, and as a part thereof, did wilfully, knowingly and felo-

niously execute a certain certificate and writing in words and figures substantially as follows:

Federal Public Works Project No. Docket 1907-F

* * *

"The undersigned hereby certifies that this Proposal is genuine, and not sham or collusive, or made in the interest or in behalf of any person, firm or corporation not herein named, and that the undersigned has not, directly or indirectly induced or solicited any other bidder to submit a sham bid, or any other person, firm, or corporation to refrain from bidding, and that the undersigned has not in any manner sought by collusion to secure for himself an advantage over any other bidder.

December 22, 1938

Firm name: Franklin Electric and Construction Company

By: Thomas C. Hodgdon

Title: President

Official Address: 117 First Ave., Pittsburgh, Penna."

which said certificate was and is false and contains fraudulent and fictitious statements and entries in the following respects:

7. The statement in said certificate that "this Proposal is genuine and not sham or collusive" is false, fictitious, fraudulent and misleading because the defendants are affiliated, as members, with the Electrical Contractors' Association of Pittsburgh, which Association requires its members to submit their bids to the Association prior to submitting them to the Awarding Authority, whereupon such bids were, by said Association, collusively compared, altered, decreased or increased according to the dictates of said Association, and said Proposal so submitted by said defendant contains a bid price of Sixty two thousand two hundred sixty-eight

dollars ($62,268.00) which figures and amounts were so collusively fixed by said defendant and said Association; and

8. Said defendant knowingly, wilfully and feloniously made and caused to be made said false certificate, hereinbefore in paragraph 6 described, knowing the same to contain fraudulent and fictitious statements, hereinbefore in paragraph 7 described, in the matter of the construction of said South Vocational High School and Athletic Field project, a matter within the jurisdiction of the Public Works Administration, a Department and Agency of the United States, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the Grand Jurors aforesaid, upon their oaths aforesaid, further present and find:

9. That heretofore, to wit, on or about the 10th day of August, in the year of our Lord, one thousand nine hundred and thirty-nine, at Pittsburgh, Pa., in the County of Allegheny, in the Western District of Pennsylvania, and within the jurisdiction of this Court, Franklin Electric & Construction Company a Pennsylvania corporation and Thomas G. Hodgdon and hereafter referred to as the defendant, did knowingly, wilfully and feloniously make, use and cause to be made and used, a certain false certificate knowing the same to contain fraudulent and fictitious statements in a matter within the jurisdiction of a Department and Agency of the United States, that is to say:

10. The Department and Agency of the Government of the United States was the Federal Emergency Administration of Public Works (commonly known as the Public Works Administration and hereafter so referred to), created and existing by virtue of the pro-

visions of Title II of the National Industrial Recovery Act (Sections 201, et seq.; 40 U. S. C. A., Sec. 401, et seq.), and the Rules and Orders promulgated under the authority thereof;

11. Said Public Works Administration financed in part, through grant of funds of said Department, construction of a civilian project known as Pa. P.W.A. Project No. PA 2218-F more particularly known as Municipal Hospital, a public building in Pittsburgh, Pa., which construction was also financed in part, by funds made available by the City of Pittsburgh, Pittsburgh, Allegheny County, Pennsylvania;

12. The partial financing of the construction of said Municipal Hospital, and the actual construction thereof were matters within the jurisdiction of said Public Works Administration, an Agency and Department of the United States;

13. On or about the 10th day of August, in the year of our Lord, one thousand nine hundred and thirty-nine, said City of Pittsburgh (Department of Public Health), hereinafter referred to as the Awarding Authority, invited sealed Proposals (bids) containing certification that said Proposal was genuine and not sham or collusive, for general construction, heating and ventilating, electrical and other contracts in connection with the construction of said Municipal Hospital;

14. On or about the 10th day of August, in the year of our Lord, one thousand nine hundred and thirty-nine, Franklin Electric & Construction Company, a Pennsylvania Corporation, and Thomas G. Hodgdon, the defendant aforesaid, in response to said invitation, submitted to said City of Pittsburgh (Department of Public Health) at Pittsburgh, in said Western District of Pennsylvania, written Proposal (bid) for the electrical work for said Municipal Hospital, and in connection therewith, and as a part thereof, did wilfully, knowingly and

feloniously execute a certain certificate and writing in words and figures substantially as follows:

P.W.A. Project No. PA 2218-F. * * *

"The undersigned hereby certifies that this Proposal is genuine, and not sham or collusive, or made in the interest or in behalf of any person, firm or corporation not herein named, and that the undersigned has not, directly or indirectly induced or solicited any other bidder to submit a sham bid, or any other person, firm, or corporation to refrain from bidding, and that the undersigned has not in any manner sought by collusion to secure for himself an advantage over any other bidder.

August 10, 1939

Firm Name: Franklin Electric & Construction Co.

By: Thomas G. Hodgdon

Title: President

Official Address: 117 First Ave., Pittsburgh, Penna."

which said certificate was and is false and contains fraudulent and fictitious statements and entries in the following respects:

15. The statement in said certificate that "this Proposal is genuine and not sham or collusive" is false, fictitious, fraudulent and misleading because the defendants are affiliated, as a member, with the Electrical Contractors' Association of Pittsburgh, which Association requires its members to submit their bids to the Association prior to submitting them to the Awarding Authority, whereupon such bids were, by said Association, collusively compared, altered, decreased or increased according to the dictates of said Association, and said Proposal so submitted by said defendant contains a bid price of one hundred and fifty five thousand two hundred sixty dollars ($155,260.00), which figures and amounts

were so collusively fixed by said defendant and said Association; and

16. Said defendants knowingly, wilfully and feloniously made and caused to be made said false certificate, hereinbefore in paragraph 14 described, knowing the same to contain fraudulent and fictitious statements, hereinbefore in paragraph 15 described in the matter of the construction of said Municipal Hospital project, a matter within the jurisdiction of the Public Works Administration, a Department and Agency of the United States; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

(Signed) M. NEIL ANDREWS
(Signed) R. MCDONALD GRAY
PERRY WATZMAN
Special Assistants to the
Attorney General.

GEORGE MASHANK
Acting United
States Attorney.

UNITED STATES OF AMERICA, ex rel. MORRIS MARCUS, Plaintiffs
Versus
WILLIAM F. HESS, AND OTHERS, Defendants

PLAINTIFFS TABULATION OF DAMAGES

PROJECT NUMBER	NAME OF PROJECT	SPONSOR	CONTRACTOR	CONTRACT PRICE	PLAINTIFFS CLAIM OF FAIR AND REASONABLE COMPETITIVE LOW BID	DAMAGES	PERCENT OF GOVERNMENT GRANT	ACTUAL DAMAGES SUFFERED BY GOVERNMENT	DAMAGES SUFFERED BY THE GOVERNMENT DOUBLE IN AMOUNT
PA 1908 F	Miller Elementary School	Board of Education City of Pittsburgh	W. C. Hemmerle Elec. Co.	$ 24,158.00	$ 14,083.10	$10,136.90	45	$ 4,568.00	$ 9,116.00
PA 1619 F	Arsenal Elementary School	Board of Education City of Pittsburgh	Crosneveth Elec. Co.	32,865.00	23,887.85	8,977.15	45	1,539.71 *	3,079.42
PA 1303 R	Washington Trade School	Board of Education City of Pittsburgh	Fort Pitt Electric Co.	46,411.00	33,387.99	13,083.01	45	6,773.85	13,547.70
PA 1173 D	Prospect Jr. High School	Board of Education City of Pittsburgh	Crosneveth Elec. Co.	38,241.00	30,627.50	7,613.50	45	3,426.07	6,852.14
PA 1308 R	Burgwin Elementary School	Board of Education City of Pittsburgh	R. M. Morganstern	21,516.00	15,029.13	6,486.87	45	2,919.09	5,838.18
PA 1688 F	Schiller Elementary School	Board of Education City of Pittsburgh	Devlin Elec. Constr. Co.	27,720.00	16,256.82	11,463.18	45	3,156.43 *	6,316.84
PA 1150 R	Carnalt Elementary School	Board of Education City of Pittsburgh	Stauffer Elec. Co.	7,860.00	5,785.05	2,074.95	45	933.72	1,867.44
PA 1907 F	South Vocational High School	Board of Education City of Pittsburgh	Hess and Barton	58,403.00	35,161.95	23,241.05	45	5,545.44 *	11,090.92
PA 2016 F	Spring Garden Elementary School	Board of Education City of Pittsburgh	Redden Elec. Co.	23,233.00	14,089.82	9,803.18	45	4,141.43	8,282.86
PA 1317 R	Banksville Elementary School	Board of Education City of Pittsburgh	R. W. Schindler Elec. Co.	8,358.60	7,882.77	475.83	45	241.12	482.24
PA 1156 R	Spring Hill Elementary School	Board of Education City of Pittsburgh	Redden Elec. Co.	8,960.00	6,863.45	2,096.55	45	943.44	1,886.88
PA 1687 F	Concord Elementary School	Board of Education City of Pittsburgh	Fort Pitt Elec. Co.	28,013.00	16,919.54	9,093.46	45	2,592.05 *	5,184.10
PA 1618 F	Crescent Elementary School	Board of Education City of Pittsburgh	Morganstern Elec. Co.	34,940.00	20,342.73	14,597.27	45	6,568.77	13,137.54
PA 1899 R	Perry Athletic Field House	Board of Education City of Pittsburgh	J. W. Craig Elec. Co.	968.00	863.82	104.18	45	46.88	93.76
PA 7501	Juvenile Court	Allegheny County	S. L. Craig Elec. Co.	21,819.00	17,971.16	3,847.84	30	1,094.35	2,188.70
PA 4242	County Home - Woodville	" "	Hess and Barton	400,974.00	261,984.56	139,009.44	30	41,702.83	83,405.66
PA 7000 R	Municipal Airport - A B C D E	" "	Sargent Engr. Co.	65,276.00	47,635.76	17,642.24	45	7,939.00	15,878.00
PA 7000 R	Municipal Airport - F	" "	Sargent Engr. Co.	45,918.00	31,338.86	14,579.14	45	6,560.61	13,121.22
PA 7000	North Park Bath House	" "	Morris Engr. Co.	16,906.00	13,187.33	3,718.67	45	1,673.40	3,346.80
PA 9616	North Park Boat House	" "	MacNeil Elec. Co.	5,595.00	4,231.68	1,363.32	45	613.49	1,226.98
PA 1980 F	West View High School	School District of West View	Fort Pitt Electric Co.	38,650.00	28,214.16	10,435.84	45	4,696.12	9,392.24
PA 1069	Hampton School - Additionals	School District of Hampton Twp.	Carter Electric Co.	3,150.00	2,343.08	806.92	45	363.11	726.22
PA 1144	North Fayette High School	School District of N. Fayette Twp.	Carter Electric Co.	5,766.00	4,490.81	1,275.19	45	573.83	1,147.66
PA 1692 D.S.	Braddock Jr. High School	School District of Braddock	Crosneveth Elec. Co.	36,618.00	28,764.67	7,853.33	45	1,087.38 *	2,174.76
PA 1130	Westinghouse Memorial High School	School District of Wilmerding	Morris Engr. Co.	36,672.00	22,600.44	14,071.56	45	6,332.20	12,664.40
PA 1598	Kenmar School	School District of Kennedy	J. W. Craig Elec. Co.	2,198.00	2,069.70	122.30	45	55.03	110.06
PA 1456	Edwin Markham School	School District of Mt.Lebanon Twp.	Stauffer Elec. Co.	3,988.00	3,652.57	332.43	45	149.59	299.18
PA 1703 D.S.	Crafton Municipal Bldg.	Boro of Crafton	Diamond Elec. Co.	5,735.00	3,595.10	2,139.90	45	962.95	1,925.90
PA 1456	Lincoln School Bldg. - Mt. Lebanon	School District of Mt. Lebanon	Ross Elec. Co.	1,066.00	872.99	193.01	45	86.40	172.80
PA 1575	Filtration Plant - Braddock	Boro of Braddock	Ross Elec. Co.	11,150.00	7,922.48	3,227.52	45	1,452.38	2,904.76
PA 2224 F	Shaler Twp. Softening Plant	Twp. of Shaler	H. D. Hale Elec. Co.	6,600.00	4,678.85	1,921.15	45	864.51	1,729.02
PA 1548	Library School	School District of Swissvale Twp.	H. D. Hale Elec. Co.	4,200.00	3,539.68	660.32	45	297.14	594.28
PA 1977 F	Seibert School	School District of Ross Twp.	Industrial Elec. Co.	2,587.00	1,936.57	650.43	45	283.69	567.38
PA 1189	School Build'ng - Chalfonte	School Board of Chalfonte	H. D. Hale Elec. Co.	3,186.00	2,461.81	696.79	45	313.55	627.10
PA 1635 F	Cowley-Goettman Playground	City of Pittsburgh	K. K. Wood	7,432.00	4,495.63	2,936.37	45	1,321.36	2,642.72
PA 1600 F	Sophie Ewart No. 4 Playground	"	R. G. Diodati	1,054.00	528.14	525.86	45	77.98 *	155.96
PA 1600 F	Schenley Park Comfort Station	"	L. A. Berkman	1,387.00	880.26	506.74	45	83.88 *	167.76
PA 1600 F	Garfield Play. Field House	"	Levenson Elec. Co.	1,148.00	551.50	596.50	45	88.31 *	176.62
PA 1600 F	Townsend Play. Field House	"	L. A. Berkman	455.00	256.79	198.21	45	28.89 *	57.78
PA 1600 F	Larimer Play. Field House	"	Levenson Elec. Co.	471.00	259.79	211.21	45	31.26 *	62.52
PA 1600 F	Armstrong Play. Field House	"	L. A. Berkman	1,185.00	585.12	599.88	45	88.78 *	177.56
PA 1635	Magee Playground	"	R. G. Diodati	5,319.00	3,483.88	1,856.18	45	835.28	1,670.56
PA 1987	West Penn Playground	"	Devlin Elec. Co.	9,632.00	4,999.00	3,233.00	45	1,454.85	2,909.70
PA 1987	Homewood, etc. Filter Houses	"	Levenson Elec. Co.	3,990.00	2,324.03	1,565.97	45	704.68	1,409.36
PA 1600 F	Sophie Ewart No. 1 Field House	"	Ross Electric Co.	886.00	413.45	474.57	45	70.24 *	140.48
PA 1600 F	McKinley Park P. H.	"	L. A. Berkman	468.00	321.57	160.43	45	20.79 *	41.58
PA 2208	Schenley, etc. Filter Houses	"	L. A. Berkman	2,525.00	1,493.83	1,031.17	45	464.02	928.04
PA 1634	Burgwin Playground	"	J. W. Craig Elec. Co.	4,870.00	3,857.62	3,013.38	45	905.57	1,811.14
			TOTAL	$ 1,108,370.60	$ 747,486.71	$ 360,881.89		$ 126,636.47	$ 253,276.94

* ASTERICK INDICATES FIGURES ARE NET AFTER DEDUCTION. AMOUNT WITHHELD BY THE GOVERNMENT

Defendants' Points.

The defendants other than Robert C. Carmack, jointly and severally, respectfully request the Court to charge the jury as follows:

1. Under the law and the evidence in this case the verdict must be in favor of each of said defendants.

The grounds therefor are as follows:

(1) The defendants cannot be subjected to forfeitures, penalties or double damages in the present action, because they have already been punished for the same offenses by fines in criminal proceedings.

(2) The Informers Act, being R. S. §§ 3490 to 3494, upon which this suit is based, does not authorize, and will not support, such a suit as this one.

(3) The necessary authorization or sanction by government officials for the institution or prosecution of this suit has not been obtained or shown.

(4) The relator, Marcus, was not an informer and, therefore, is not entitled to maintain this suit.

(5) With respect to the corporate defendants, there is the further reason that the Informers Act upon which this suit is based does not apply to them or warrant a recovery under its provisions against corporations.

(6) There is a misjoinder of actions and parties in that no conspiracy has been proven which involves all of the defendants.

(7) As to the defendants C. W. Ridinger, Sr., Warren I. Bickford and Robert B. Yates, there is the further reason that there is not sufficient evidence that they participated in the alleged conspiracy or that they violated R. S. § 5438.

(8) There is not sufficient evidence on which to assess or by which to measure any damages. It is impossible to tell from the evidence how much the Federal

Government paid out because of the alleged offenses of the defendants, which it would not have paid out in the absence of such acts of the defendants. Refused.

Defendant's Point.

The defendant, C. W. Ridinger, Sr., respectfully requests the Court to charge the jury as follows:

1. Under the law and the evidence in this case the verdict must be in favor of the defendant, C. W. Ridinger, Sr.

For the grounds for this motion see the joint and several motion of the defendants other than Robert C. Carmack for a directed verdict in favor of each of them, which grounds are hereby incorporated in this motion as fully as if set forth at large herein. Refused.

(A similar point was filed by each other defendant, except Carmack.)

Points for Charge.

The defendants other than Robert C. Carmack respectfully request the Court to charge the jury as follows:

1. If you find for the plaintiff, there can be only one penalty or forfeiture of $2,000 included in your verdict in this case. Refused.

2. Each defendant in this case can be held liable only for the damages, if any, which were sustained by the Federal Government on jobs on which that particular defendant bid or on which he refrained from bidding because of conspiring with others. Refused.

3. Each and every defendant in this case is presumed to be innocent until proved otherwise. Refused.

4. The burden of proof is upon the plaintiff in this

case to convince you beyond a reasonable doubt; not merely by a preponderance of the evidence. Refused.

4½. If the jury finds that the defendants have already been punished for the acts complained of in this action, they may not be penalized the second time either by double damages, forfeitures or penalties. Refused.

5. No inference against the defendants may be drawn from the fact that they refused to testify, because in so doing they were merely exercising a right which the United States Constitution gives them. Affirmed.

6. In no event would the Federal Government be entitled to the whole of the difference between what the contract was let at and Proctor's estimate, but only to 30% or 45% of such alleged damages depending on the percentage which the Government agreed to grant on each respective project. Affirmed.

7. If the maximum limit of the Federal Government's agreed contribution on any project would have been reached without the alleged excessive amount of the electrical contract, there can be no recovery of any damages on account of such projects in this case. Refused.

8. There can be no recovery of any damages because of any payments made upon periodic estimates for partial and final payment, known as I 23 forms, which were submitted by contractors after February 5, 1940. Refused.

9. There can be no recovery of any penalty or forfeiture on account of any project in which no actual damages have been shown. Refused.

10. Where the United States Government has since February 5, 1940, paid any sponsor an amount in excess of the amount of the percentage of alleged damages to which the Government would be entitled, there can be no recovery on that particular project. Refused.

11. No damages can be recovered in this case on account of the County Home job at Woodville. Refused.

12. No damages can be recovered in this case on account of the Spring Garden Elementary School job. Refused.

13. No damages can be recovered in this case on account of the Magee Playground Bath and Field House job. Refused.

14. No damages can be recovered in this case on account of the Cowley-Goettman Playground Swimming Pool job. Refused.

15. No damages can be recovered in this case on account of the Burgwin Playground Swimming Pool job. Refused.

16. No damages can be recovered in this case on account of the Schenley Park Comfort Station job. Refused.

17. No damages can be recovered in this case on account of the McKinley Park Field House job. Refused.

18. No damages can be recovered in this case on account of the Sophia Evert Playground No. 1, Contract No. 14, Field House job. Refused.

19. No damages can be recovered in this case on account of the Townsend Playground Field House job. Refused.

20. No damages can be recovered in this case on account of the Larimer Playground Field House job. Refused.

21. No damages can be recovered in this case on account of the West Penn Playground Recreational Building job. Refused.

22. No damages can be recovered in this case on account of the Armstrong Playground Field House job. Refused.

23. No damages can be recovered in this case on account of the Sophia Evert Playground, Contract No. 29, Field House job. Refused.

24. No damages can be recovered in this case on account of the Garfield Playground Field House job. Refused.

25. No damages can be recovered in this case on account of the Schenley, Riverview and Leslie Swimming Pool Filter Houses job. Refused.

26. No damages can be recovered in this case on account of the Homewood, Phillips, Murray, Sheridan and Olympia Swimming Pool Filter Houses job. Refused.

27. If the jury should find in favor of the plaintiff, from any damages which may be found due on account of the Concord Elementary School Project, there should be deducted the sum of $1,500, withheld by the Government on account of the electrical contract on that project. Affirmed.

28. If the jury should find in favor of the plaintiff, from any damages which may be found due on account of the Schiller Elementary School project, there should be deducted the sum of $2,000, withheld by the Government on account of the electrical contract on that project. Affirmed.

29. If the jury should find in favor of the plaintiff, from any damages which may be found due on account of the South Vocational High School project, there should be deducted the sum of $4,913.01, withheld by the Government on account of the electrical contract on that project. Affirmed.

30. If the jury should find in favor of the plaintiff, from any damages which may be found due on account of the Arsenal Elementary School project, there should be deducted the sum of $2,500, withheld by the Government on account of the electrical contract on that project. Affirmed.

31. If the jury should find in favor of the plaintiff, from any damages which may be found due on account of the Braddock Junior High School project, there

should be deducted the sum of $2,446.61, withheld by the Government on account of the electrical contract on that project. Affirmed.

32. In the case of the South Vocational High School project, if the jury should find for the plaintiff, the jury should deduct from the contract price the sum of $12,087.83, the amount withheld by the School Board of the City of Pittsburgh from the electrical contractor, before figuring any damages. Refused.

33. In the case of the South Vocational High School project, if the jury should find for the plaintiff, the actual damages cannot exceed $105.94. Refused.

34. In the case of the West View High School project, if the jury should find for the plaintiff, the jury should deduct from the contract price the sum of $5,936.33, the amount withheld by the School District of the Borough of West View from the electrical contractor, before figuring any damages. Refused.

35. In the case of the West View High School project, if the jury should find for the plaintiff, the actual damages cannot exceed $2,024.78. Refused.

36. If the jury finds that any one or more of the defendants did not participate in any unlawful act, the jury should find in favor of such defendant or defendants, even though the verdict be against other defendants. Refused.

Verdict.

Now March 22, 1941, we the Jurors empaneled in the case above entitled, find a verdict in favor of Plaintiff and against all the defendants except Robert C. Carmack, in the sum of $315,100.91, being $203,100.91 damages and $112,000 penalty, and as to defendant Robert C. Carmack, we find a verdict in his favor.

WALTER S. COLMERY,
Foreman.

Motion for Judgment on Reserved Points.

Now, to wit, March 31, 1941, come each and all of the defendants in the above-entitled case other than Robert C. Carmack, by their attorneys, and jointly and severally move the court that all the evidence taken upon the trial of the above-entitled case be certified and filed so as to become part of the record, that the verdict and judgment heretofore entered in this case be set aside, and that judgment be entered in favor of each of said defendants, respectively, in accordance with the joint, several and separate motions for a directed verdict which were presented by said defendants at the trial and are now of record in this Court.

WILLIAM H. ECKERT,
EUGENE B. STRASSBURGER,
J. VINCENT BURKE, JR.,
Attorneys for defendants other than Robert C. Carmack.

ORDER OF COURT.

Now, to wit, March 31, 1941, the foregoing motion having been presented in open court, upon consideration thereof it is ordered and directed that the motion be filed and that all of the evidence taken upon the trial be duly certified and filed so as to become part of the record in this case, and a rule is hereby granted upon the plaintiffs to show cause why the verdict and judgment heretofore entered in this case should not be set aside and judgment entered in favor of each and all of the defendants other than Robert C. Carmack, in accordance with the joint, several and separate motions for a directed verdict which were presented by said defendants and are now of record in this Court, all proceedings in the meantime to be stayed.

Motion for Judgment on Reserved Point.

Now, to wit, March 31, 1941, comes the defendant, C. W. Ridinger, Sr., by his attorneys, and moves the court that all the evidence taken upon the trial of the above-entitled case be certified and filed so as to become part of the record, that the verdict and judgment heretofore entered against him in this case be set aside, and that judgment be entered in favor of said defendant in accordance with his motion for a directed verdict presented by him at the trial and now of record in this Court.

WILLIAM H. ECKERT,
SMITH, BUCHANAN & INGERSOLL,
Attorneys for defendant C. W. Ridinger, Sr.

ORDER OF COURT.

Now, to wit, March 31, 1941, the foregoing motion having been presented in open court, upon consideration thereof it is ordered and directed that the motion be filed and that all the evidence taken upon the trial be duly certified and filed so as to become part of the record in this case, and a rule is hereby granted upon the plaintiffs to show cause why the verdict and judgment heretofore entered in this case should not be set aside and judgment entered in favor of the defendant, C. W. Ridinger, Sr., in accordance with his motion for a directed verdict presented by him at the trial and now of record in this Court, all proceedings in the meantime to be stayed.

PER CURIAM

S.

(A similar motion and order were made for each other defendant, except Carmack.)

Motion for New Trial.

Filed April 1, 1941.

Now, to wit, March 31, 1941, come the defendants in the above-entitled case, jointly and severally, by their attorneys, and move the court to grant each and all of them a new trial for the following reasons, reserving the right to file additional reasons if necessary:

1. The verdict is inconsistent and capricious, because it excludes the defendant Carmack from liability, who by his own tstimony was the active manager of the alleged bid-rigging. If he is not liable then no other defendant can be liable.

2. The learned trial judge erred in excluding evidence of the cost of performing the contracts on which damages were claimed.

3. The learned trial judge erred in excluding the testimony of Special Assistant to the Attorney General, M. Neil Andrews.

4. The learned trial judge erred in excluding the records of the criminal proceedings at No. 10462 Criminal to No. 10498 Criminal, both inclusive, in the District Court of the United States for the Western District of Pennsylvania.

5. The learned trial judge erred in refusing the defendant's first point for charge.

6. The learned trial judge erred in refusing the defendants' second point for charge.

7. The learned trial judge erred in refusing the defendants' third point for charge.

8. The learned trial judge erred in refusing the defendants' fourth point for charge.

9. The learned trial judge erred in refusing the defendants' point for charge numbered 4½.

10. The learned trial judge erred in the qualifica-

tion or comments which he added to the defendants' fifth point for charge.

11. The learned trial judge erred in refusing the defendants' seventh point for charge.

12. The learned trial judge erred in refusing the defendants' eighth point for charge.

13. The learned trial judge erred in refusing the defendant's ninth point for charge.

14. The learned trial judge erred in refusing the defendants' tenth point for charge.

15. The learned trial judge erred in refusing the defendants' eleventh point for charge.

16. The learned trial judge erred in refusing the defendants' twelfth point for charge.

17. The learned trial judge erred in refusing the defendants' thirteenth point for charge.

18. The learned trial judge erred in refusing the defendants' fourteenth point for charge.

19. The learned trial judge erred in refusing the defendants' fifteenth point for charge.

20. The learned trial judge erred in refusing the defendants' sixteenth point for charge.

21. The learned trial judge erred in refusing the defendants' seventeenth point for charge.

22. The learned trial judge erred in refusing the defendants' eighteenth point for charge.

23. The learned trial judge erred in refusing the defendants' nineteenth point for charge.

24. The learned trial judge erred in refusing the defendants' twentieth point for charge.

25. The learned trial judge erred in refusing the defendants' twenty-first point for charge.

26. The learned trial judge erred in refusing the defendants' twenty-second point for charge.

27. The learned trial judge erred in refusing the defendants' twenty-third point for charge.

28. The learned trial judge erred in refusing the defendants' twenty-fourth point for charge.

29. The learned trial judge erred in refusing the defendants' twenty-fifth point for charge.

30. The learned trial judge erred in refusing the defendants' twenty-sixth point for charge.

31. The learned trial judge erred in refusing the defendants' thirty-second point for charge.

32. The learned trial judge erred in refusing the defendants' thirty-third point for charge.

33. The learned trial judge erred in refusing the defendants' thirty-fourth point for charge.

34. The learned trial judge erred in refusing the defendants' thirty-fifth point for charge.

35. The learned trial judge erred in refusing the defendants' thirty-sixth point for charge.

36. The learned trial judge erred in excluding the evidence offered to show that the defendant Edwin C. Carter was in the military forces of the United States at all times material to this case.

37. The learned trial judge erred in admitting in evidence the statement of claim in the suit brought by Thomas J. Lesterick.

38. The learned trial judge erred in admitting in evidence the estimates made by the witness Proctor.

39. The learned trial judge erred in refusing to withdraw a juror and continue the case because of the improper and prejudicial arguments made by the plaintiff's counsel in his closing address to the jury regarding the action taken in the criminal proceedings against the defendants.

40. The learned trial judge erred in denying the defendants' motion to strike out because based upon hearsay the testimony of the witness Proctor regarding the Arsenal School, the Cowley-Goettman Playground, the Schiller School, the South Vocational High School,

the Braddock Junior High School, the Woodville Home and the Municipal Airport.

41. The learned trial judge erred in the following portion of his charge to the jury (R. 5496):

> "Now, the first question, I would say, for you to consider is whether or not the defendants, or any of them, were involved in the conspiracy to defraud the United States in the matter of electrical contracts awarded on certain PWA projects in the Western District of Pennsylvania to which the United States appropriated and contributed Federal funds to the extent of forty-five per cent or thirty per cent of the actual cost of the electrical work."

42. The learned trial judge erred in the following portion of his charge (R. 5500):

> "Now, the plaintiffs in this case have the burden of showing by the fair weight of the testimony that the defendants were engaged in a conspiracy to defraud the United States, * * *."

43. The learned trial judge erred in including the County Home job at Woodville as one which the jury might find had been handled in accordance with the improper method of bidding charged in the complaint.

44. The learned trial judge erred in charging the jury that a $2,000 penalty or forfeiture should be included by them in their verdict for each project which they found had been collusively bid.

45. The learned trial judge erred in the following portion of his charge (R. 5509-5510):

> "And in connection with the Government's portion of furnishing the money to complete these projects, we say to you that it is of no importance that the money paid out to the electrical contractors on the projects involved in this case was paid through the agency of the Municipal Corporation,

School District, County, or other agency of the State of Pennsylvania. In our view, the money to be expended as the share of the United States on these projects was ear-marked as Federal funds. All these projects carried on with money derived from the Federal Government had to be approved by the Federal Administrator. The diversion of these funds to the project to which they were assigned was a diversion of Government money."

46. The learned trial judge erred in the following portion of his charge (R. 5502):

"However, we say to you that, even without corroborating evidence, if you believe the testimony of Carmack, that would be sufficient evidence upon which to base a verdict for the plaintiffs in this case."

47. The charge was inadequate, prejudiced and unfair in that the learned trial judge specifically called the attention of the jury to evidence corroborating Carmack, but ignored the defendants' evidence which contradicted Carmack.

48. The learned trial judge erred in refusing to permit the character witnesses to testify.

49. The learned trial judge erred in commenting upon or drawing attention to the fact that the defendants had not testified in their own behalf.

50. The learned trial judge erred in reforming the verdict of the jury.

51. The verdict is excessive.

52. The learned trial judge erred in admitting the evidence as to the manner in which the County Home at Woodville contract was obtained by Hess & Barton, Inc.

53. The learned trial judge erred in refusing to permit defendants' counsel make the witness Proctor show in detail in court how he arrived at his estimate of

the cost of the labor required to do the North Fayette School project.

54. The learned trial judge erred in refusing to permit defendants' counsel make the witness Proctor show or measure on the plans in court where the 2610 feet of 1/0 wire that the witness said would suffice to do the Arsenal School job would go.

WILLIAM H. ECKERT,
EUGENE B. STRASSBURGER,
J. VINCENT BURKE, JR.,
Attorneys for Defendants.

JOHN B. NICKLAS, JR.
Of Counsel.

Opinion on Defendants' Motion for Judgment Non Obstante Veredicto or for a New Trial.

Filed August 12, 1941.

SCHOONMAKER, Judge:

This is an informer's action based on Section 5438 and Sections 3490 to 3494 inclusive, of Revised Statutes, in relation to false claims against the United States. The case, on trial from December 2, 1940, to March 22, 1941, resulted in a verdict in favor of plaintiff and against all the defendants—except the defendant Carmack—in the sum of $315,100.91. All the defendants, except Carmack, have moved for judgment in their favor, non obstante veredicto, or, in lieu thereof, for a new trial.

The suit charges the Electrical Contractors Association of Pittsburgh, Inc., its officers, general manager, and members, with a conspiracy to defraud the United States, a department or officer thereof, in the matter of electrical works on PWA projects, by obtaining or aiding to obtain the payment or allowance of false or fraudulent claims for such electrical work against the United

States. That is made an offense by Section 5438 R. S. Section 3490 R. S. provides that any person who shall do or commit any of the acts prohibited by the provisions of Section 5438, shall forfeit and pay to the United States the sum of $2000.00; and in addition, double the amount of damages which the United States may have sustained by reason of doing or committing such acts, together with the costs of suit. This section further provides that such forfeiture and damages shall be sued for in the same suit.

Section 3491 of Revised Statutes gives jurisdiction to United States District Courts to hear and determine such suits; and provides that they may be brought and carried on by any person, as well for himself as for the United States.

An informer's action under Sections 3490-3494 of the Revised Statutes must rest on violations of Section 5438 as that section read at the time of the enactment of Section 3490. That seems to be conceded by both parties to this suit; and it has been so ruled by this court, and others. See *Olson v. Mellon*, 4 F. Supp. 947, (affirmed 71 F. (2nd) 1021; *United States ex rel. Kessler v. Mercur Corporation*, 13 F. Supp. 742, (affirmed 83 F. (2nd) 178; *United States ex rel. v. Salant & Salant, Inc.*, Decision by District Judge Patterson, July 1, 1938, (not reported).

Section 5438 of the Revised Statutes, as it stood when it was incorporated in Section 3490 R. S., reads as follows:

> "Every person who makes or causes to be made, or presents, or causes to be presented, for payment or approval, to or by any person or officer in the civil, military or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent, or who, for the purpose of obtaining, or aiding

to obtain, the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any False or fraudulent claim, or who, having charge, possession, custody or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States, or wilfully to conceal such money or other property, delivers, or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used, or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor or other person called into or employed in the military or naval service, any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not

less than One Thousand nor more than Five Thousand Dollars."

The plaintiff contends the facts of this case bring it within the purview of these statutes. The defendants contend it does not.

The complaint charges, and the evidence in this case establishes, that the United States, in pursuance of the Emergency-Relief-and-Construction Acts of Congress, made certain grants of Federal funds to be expended in public-work projects undertaken by local municipalities and school districts in Allegheny County, Pennsylvania, under the supervision of the Federal Public Works Administrator, who is an official of the United States Government. See 40 U.S.C.A. Section 401(a). An application was made in each case to the Federal Government for a grant of Federal money to be used in the construction of these projects. Plans and specifications for each project were prepared by the local municipality or school district, submitted to the Public Works Administrator of the Federal Government for approval, and were approved by him. Bids were asked for, and received, for doing the electrical work thereon. Such bids were submitted to the Administrator for approval, and were approved by him. The money the Government agreed to contribute to these projects was paid out in the course of the carrying-out of these projects only on sworn estimates submitted by the contractor to the Administrator, and approved by him on Federal Form (I 23). The Federal funds allotted to each project were placed in a bank approved by the Administrator, which bank account contained also the funds of the local authority. This special fund was from time to time checked by a representative of the Administrator; and no payments could be made therefrom to the contractor doing the work, except with the approval of the Administrator, which approval was noted on Form I 23 above mentioned.

There was a conspiracy among the defendants, whereby they would agree among themselves as to which defendant was to submit the low bid for a particular project, and which of the other defendants would submit other and higher bids for the same project, thereby intending to control, and actually controlling the low bid to be submitted, and preventing any competitors bidding on any of the projects involved in this suit; thus compelling the Government to contribute and pay for doing the electrical work on the projects more than the Government would have been required to pay, had there been open and free competition in the open market for doing the electrical work.

In this connection it will be noted that the defendant-contractors, in submitting their bids which were approved by the PWA Administrator, submitted signed statements substantially as follows:

> "The undersigned hereby certifies that this Proposal is genuine and not sham or collusive, or made in the interest or in behalf of any person, firm or corporation not herein named, and that the undersigned has not, directly or indirectly, induced or solicited any other bidder to submit a sham bid, or any other person, firm or corporation to refrain from bidding, and that the undersigned has not in any manner sought by collusion to secure for himself an advantage over any other bidder."

And further it will be noted that payments were made out of the joint construction account in banks approved by the Administrator and containing funds furnished by the United States and the local municipality or district on Forms I 23, of estimates furnished by contractor-defendants and approved by the Administrator. Therefore, in each transaction there was not an absolute gift of money to the local municipality or district, but a grant of money by the Government for payment to the contractor for a portion of the work, which was

disbursed only on vouchers submitted by the contractor to the Administrator, and approved by him.

In our opinion, the facts of the case bring it squarely within the provisions of Section 5438 Revised Statutes, which is applicable to "Every person who makes or causes to be made, or presents, or causes to be presented, for payment or approval to or by any person in the civil, military or naval service of the United States, any claim upon or against the Government of the United States, or any department, or officer thereof, * * *" It requires no strained or forced construction of this Act to bring the facts of this case within the purview of Section 5438 Revised Statutes. A fair construction of this statute makes it apply to the facts of this case, because the claim on which the Government money was paid to defendant contractors, was made directly to an officer of the Government; and, upon the allowance of this claim, the Government contribution to the PWA project was paid to them, out of the special construction account, in accordance with the terms and conditions under which these grants were made, i. e. PWA Form 230. This form provides in Part II, Paragraph 6, on page 5:

> "6. Disbursement of moneys in Construct-Account.—Moneys in the Construction Account will be expended only for such purposes as shall have been previously specified in a signed certificate of purposes filed with and accepted by the Government. * * *"

It is our view that the Federal funds in these special construction accounts continued to be Federal funds until paid out to the contractors. This view finds support in *Madden vs United States,* 80 F. (2nd) 672, in which there was a grant of Federal funds by the Federal Emergency Relief Administration to the Emergency Finance Board, a Massachusetts State Agency, which transferred part of its funds to the City of Boston for payment of Boston Public Library employees. In that

case, Judge Morris, delivering the opinion of the Circuit Court of Appeals, said on page 676:

> "* * *. Any diversion of such funds from the project to which they were assigned was a diversion of government money. As hereinbefore stated, all funds allotted by the federal government for the relief of unemployment even though disbursed by state agencies were earmarked as federal funds, and if diverted from the use for which they were granted, it constituted a fraud upon the government. Langer v. United States (C.C.A.) 76 F. (2nd) 817. See, also, United States v. Walter, 263 U. S. 15, 44 S. Ct. 10, 68 L. Ed. 137; United States v. Clallam County (D.C.) 283 F. 645."

In the case of *Langer v. United States,* 76 F. (2nd) 817, cited above, one of the questions involved was whether money loaned or granted to a state by the Reconstruction Finance Corporation, or by the Federal Emergency Relief Administration, ceased to be Federal funds. The contention was made in that case that the fund could be used in any manner the state saw fit. But the Circuit Court of Appeals held otherwise, saying on page 824:

> "On the strength of these authorities, appellants contend that the money could be used in any manner they saw fit. In our view, the authorities do not sustain this contention. Congress can inquire into the manner of the execution of this duty by the state. An arrangement in the nature of a conspiracy to defeat the application of the funds to their statutory purpose is within the rule of Haas v. Henkel, supra, and, as before observed, pecuniary loss is not essential. * * *"

Other Federal authorities support the view that the False Claims Statutes apply to frauds, even though there be an independent agency through which the money was handled.

In the case of *United States v. Carlin*, 259 Fed. 904, (District Court, E. D. Pennsylvania), the court said, on page 907:

> "The funds deposited by the United States Shipping Board Emergency Fleet Corporation under the construction contract for the payment, inter alia, of workmen's wages, were the funds of the United States which had been appropriated by Congress and authorized to be expended by the President through the agency determined by him. Through the authority delegated by him to the United States Shipping Board Emergency Fleet Corporation, under which it employed the American International Corporation as its agent, and under which the latter corporation employed the American International Shipbuilding Corporation as its agent, so much of the funds deposited as were used for payment of wages of workmen employed under the construction contract were a part of the funds of the United States and were expended by the corporation carrying out the contract only as agent for the United States.
>
> "Under the circumstances, a fraud, the effect of which was to fictitiously increase the total amount of the pay roll and therefore the contract actual cost of the shipyard at Hog Island or the vessels being constructed there, would by so much diminish the funds of the United States. * * *"

In *Belvin v. United States*, 260 Fed. 455, the United States had a contract with Porter Brothers for the construction of buildings and other government work. The contract provided that the United States was to pay the full costs of the work done, and that Porter Brothers were to be paid a certain percentage of such costs. Porter Brothers employed Belvin as a fireman and Hoffman as a timekeeper. The rate of pay for the position of

fireman was less than that for engineers. Belvin and Hoffman agreed that Belvin should be falsely and fraudulently carried on the pay rolls of the Porter Brothers as an engineer, which was done in accordance with the agreement. The defendants were indicted and convicted for conspiracy to defraud the United States. One of the arguments of counsel for the defendants was that the indictment set out a conspiracy to defraud the Porter Brothers, and not the United States. The court held that there was sufficient evidence to warrant the finding of a conspiracy to defraud the United States, Judge Pritchard saying, on page 457:

> "Any amounts paid out by Porter Bros. in excess of its 'net expenditures in the performance of said work,' in the absence of any knowledge on the part of the government, would have necessarily resulted in a loss to that extent to the United States. * * *
>
> "The defendants sought by this conspiracy to do that which would necessarily result in defrauding the government. Porter Bros. could not in any view of the case lose a cent by virtue of this transaction. Their pay rolls were only used as a means by which the defendants could make a false charge, the burden of which would fall, not upon Porter Bros., but upon the government."

In *United States v. Harding,* 81 F. (2nd) 563, the Texas irrigation district was incorporated for the purpose of constructing an irrigation project. The work was begun, but was discontinued for lack of funds, and the district applied to the United States, through the Public Works Administrator, for a loan and grant with which to complete the project, submitting plans and specifications which received the approval of the Administrator. The defendants then entered into a plan to secure a change in the method of completing the project by the substitution of a pipe system requiring the use

of redwood material for an open canal system, and so to close the bidding for the contract for the construction of the project to all bidders except bidders on redwood. Some of the conspirators were to obtain control of the redwood lumber market so that no one else would be in a position to bid successfully on the project. The conspirators were to secure to themselves the exclusive right to bid for the work on the project, and thus to secure the making of the award to them; and were arbitrarily and corruptly to fix a bid for the project at a price which would allow the defendants a profit of 30% of the actual cost of its performance. One of the defendants, a representative of the administrator, was to use his influence by way of recommendations to his superior on the approval of the grant and loan to the district for the construction of the project under the plans and specifications substituted by the conspirators, as a result of which the conspirators would be awarded the contract; the provisions for competitive bidding would be rendered of no effect; and the government grant of money would be increased. The defendants were indicted for conspiracy to defraud the United States. The district court sustained the defendants' demurrers to the indictment. The Circuit Court of Appeals, in reversing the district court, said on pages 566 and 568:

> "* * * In this manner the conspirators were to defeat and nullify the provisions of the Act of Congress with relation to grants and loans for irrigation projects and to cause the project to cost a very much larger sum—and thus to cause the United States to pay out sums of money under its agreement for the loan and for the grant which it would not otherwise have paid out. * * *"
>
> "* * * The ultimate object was the securing of the money of the United States. * * *
>
> "This is particularly true here for reasons we have already stated; namely, that the conspiracy

charged had, as its ultimate object, the obtaining by the conspirators of funds of the United States which they could not receive and which the United States would not pay out except for the unlawful acts of its own employee in confederation with the other defendants. If the plan had been successful, and if the government had paid out moneys—as a grant or gratuity—in excess of those which it would have paid except for the dishonesty of its employee in confederation with the other defendants, it would hardly be contended the payment was lawful; and this would be equally true whether the President had the right to create the Public Works Administration or whether the appropriation by Congress of moneys to the particular purpose was or was not constitutional."

Then, in *United States v. Kapp,* 302 U. S. 214, the defendants were indicted for conspiracy to defraud the United States by furnishing false information and making false statements to the Secretary of Agriculture in order to secure benefit payments under the Agricultural Adjustment Act. The defendants sold hogs to the Government at premium prices through misrepresentation as to the identity of the producers of the hogs sold and the continued ownership by such producers, when in fact the hogs belonged to one or more of the defendants. The defendants demurred upon the ground that the provisions of the statute and the regulations of the Secretary of Agriculture were void, and that the acts alleged in the indictment did not constitute an offense against the laws of the United States. The court, in reversing the lower court, and remanding it for further proceedings, said, on page 217:

"Such a construction is inadmissible. It might as well be said that one could embezzle moneys in the United States Treasury with impunity if it turns

out that they were collected in the course of invalid transactions. See Madden v. United States, 80 F. (2nd) 672, 674. Appellees were not indicted for a conspiracy to violate the Agricultural Adjustment Act but for a conspiracy to violate the statute protecting the United States against frauds. It is cheating the Government at which the statute aims and Congress was entitled to protect the Government against those who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. Such questions cannot be raised by those who make false claims against the Government. See Langer v. United States, 76 F. (2nd) 817, 824, 825; Madden v. United States, supra; United States v. Harding, 65 App. D. C. 161; 81 F. (2nd) 563, 568; United States v. MacDonald, 10 F. Supp. 948."

In *United States v. Mellon, et al,* 96 F. (2nd) 462, it was held that false statements in an application for a loan insured under the National Housing Act were within the statute making it an offense to make false statements in any matter within the jurisdiction of any department of the United States, notwithstanding the application was made only to a bank and notwithstanding the bank might not have complied strictly with the rules of the Federal Housing Administrator regarding the insurance of loans. To the same effect, see *Kay v. United States,* 303 U. S. 1, 58 S. Ct. 468.

The defendants have quoted certain cases in support of their views that the funds involved in the instant suit were not Federal funds within the meaning of Section 5438, Revised Statutes. But we are of the opinion that they do not support the defendants' position.

For instance, in the unreported case of United States on the relation of Meyer Salzman v. Salant & Salant, Inc., in the District Court of the United States

in the Southern District of New York, In Law 69-214, Judge Patterson held that the False Claims Statute did not cover the funds that were given to the Red Cross. Judge Patterson said:

> "The Red Cross is not a part of the government, nor is it a department or officer of the government. It is an incorporated association created by Act of Congress for the purposes mentioned in the act. In no sense are its funds the property of the government. In acting under the Joint Resolution of February 8, 1933, the Red Cross did not become part of the government or a department or officer of the government. Under the terms of the Joint Resolution, it merely received a donation from the Government and administered it for the purpose specified."

In this case it may be noted also that the Government retained no control over the disbursement of the fund given to the Red Cross, where in the case at bar the grant to the Public Works Administration was controlled all the way through by the PWA Administrator.

Again, in the case of United States on the relation of Robert A. Gilchrist, etc. v. American Cotton Cooperative Association, et al, in the United States District Court for the Southern District of New York, L 58-272, cited by the defendants, Judge Knox held that the plaintiff was not entitled to maintain suit, quoting an opinion by Judge Gibson in the case of Olson v. Mellon, 4 Fed. Supp. 947, in which Judge Gibson held that the False Claim Statute did not cover a false and fraudulent tax return. We cannot see that this has any bearing on the facts of the instant case.

Defendants further contend that they cannot be subject to penalties and double damages in the instant case, because they have already been punished for the same offense by fines in criminal proceedings in this court at No. 10462 Criminal. The indictment in the

criminal case charged the defendants in the instant case with a conspiracy under Section 37 of the Criminal Code (18 U.S.C.A. 88); it reads as follows:

> "* * * throughout a period of time beginning on or about the first day of January, in the year of our Lord one thousand nine hundred and thirty-five and continuing each and every day thereafter until the return of this Indictment into this court, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, and within the jurisdiction of this court, did knowingly, willfully, unlawfully, and feloniously conspire, combine, confederate, agree and have a tacit understanding together and with each other and with diverse other persons unknown to your Grand Jurors to defraud the United States, that is to say;
>
> "9. That, while keeping up an appearance of competition and conveying to awarding authorities the idea and belief that said Defendant Electrical Contractors were rival bidders, the Defendants agreed that they would abate honest rivalry, avoid and prevent competition, deceive the awarding authorities, prevent transmission to awarding authorities of bids, and, in effect, secure in advance the awarding of contracts to one of the Defendant Electrical Contractors selected by them; and so defeat the plain intent and purposes of said Acts and Resolutions and defraud the United States, all to the mutual profit of the Defendants, the injury and damage of the United States, the selfish destruction of the public interest and the impairment of governmental functions and the discredit of public officials."

To this indictment the defendants in the instant case pleaded "Nolo Contendere," and were fined by this court.

It will be noted that this indictment made no reference to the presentation of a false claim against the Government for payment or approval, such as would be required in charging an offense under Section 5438 Revised Statutes. We cannot find that the offense charged in the indictment is the same as charged in the complaint in this instant case; therefore, there is no double jeopardy here.

In addition, the case at bar is not a criminal action. It is a civil action under the provisions of Section 3490, Revised Statutes, to recover civil sanctions for the acts committed in violation of Section 5438, Revised Statutes, which is not barred by the criminal proceedings against defendants. See *Helvering v. Mitchell*, 303 U. S. 391. In this case, Mr. Justice Brandeis said, pages 399-400:

> "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether Section 293(b) imposes a criminal sanction. That question is one of statutory construction. Compare Murphy v. United States, 272 U. S. 630, 632.
>
> "Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted. Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789, Act of July 31, 1789; c. 5, Sec. 36, 1 Stat. 29, 47. In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions. Passavant v. United States, 148

U. S. 214; United States v. Zucker, 161 U. S. 475; Hepner v. United States, 213 U. S. 103; Oceanic Steam Navigation Co. v. Stranahan, 214 U. S. 320; Chicago, B. & Q. Ry. Co. v. U. S., 220 U. S. 559; 578; United States v. Regan, 232 U. S. 37; Grant Bros. Construction Co. v. United States, 232 U. S. 647, 660; Murphy v. United States, 272 U. S. 630; Various Items v. United States, 282 U. S. 577; Lloyd Sabaudo Societa v. Elting, 287 U. S. 329, 334."

We therefore conclude that the plea of double jeopardy is of no avail to the defendants.

Defendants further contend that this suit will not lie, because it has not been authorized by the Commissioner of Internal Revenue and the Attorney General, as provided for by Section 3214, Revised Statutes, which reads as follows:

> "Sec. 3214. No suit for the recovery of taxes, or of any fine, penalty, or forfeiture shall be commenced unless the Commissioner of Internal Revenue authorizes or sanctions the proceedings: Provided, That in case of any suit for penalties or forfeitures brought upon information received from any person, other than a collector or deputy collector, the United States shall not be subject to any costs of suit."

In our opinion, that statute does not apply to the instant case. It relates to taxes, fines, and penalties relating to taxes. This suit is directly authorized by 3491 R. S., which provides, inter alia: "Suit may be brought and carried on by any person as well for himself as for the United States; * * *." We therefore conclude that this objection to the instant suit was not well taken.

As to defendants' contention that Marcus is not an informer within the Act, because he furnished no information to the Government as to the facts upon which

this suit is based before filing his suit, in our opinion that is not a necessary prerequisite to a suit under Section 3491 R. S., which expressly authorized "any person" to bring and carry on suit, with no requirement of previous notice to the United States. We therefore conclude this objection is without merit.

Defendants contend that there has been a misjoinder of parties-defendants, in that all the parties-defendants are charged to have participated in a joint conspiracy; and that there has been no sufficient proof to bind some of them. If that were so, the effect would be not to defeat the entire action, but would prevent recovery only against the defendants as to whom there was insufficient evidence.

The general rule is that in a civil action for conspiracy to defraud, the liability of the individual defendants, as well as the existence of the conspiracy, is for the jury. A verdict may be against those whom the evidence shows are guilty, and in favor of those who are innocent. See *Barry v. Legler*, 39 Fed. (2nd) 297, 303.

Counsel for defendants, C. W. Ridinger, Sr., President of Iron City Engineering Company, and Warren I. Bickford, its Secretary and Treasurer; and counsel for Robert Yates, Vice-President of MacNeil Electric Company: contend there is not sufficient evidence in this case to permit a recovery against the defendants individually.

The rule to be applied to corporate officers in reference to their personal liability for wrongful acts of a corporation, is stated in *14A Corpus Juris*, 175, 176, as follows:

> "A director, officer, or agent of a corporation is liable in damages for injuries suffered by third persons because of his torts, regardless of whether he acted on his own account or on behalf of the corporation and regardless of whether or not the corporation is also liable. He cannot escape liability on the ground that in committing the tort he acted

as a director, officer, or agent of the corporation, or on the ground that the corporation may also be liable. As in any case, it is of course necessary that the facts show the commission of a tort before the officer may be held liable therefor. An officer or director of a corporation is not liable for its torts where he has not participated therein, or had any knowledge of, or given any consent to, the act or transaction.. Conversely, he is liable where he has participated or where he has had knowledge from first to last of the wrongful acts of the corporation. Likewise a director or officer is not, merely by virtue of his position, liable in all cases for the torts of other directors, officers, or agents; he is liable when, and only when, he participated in the tortious act, authorized or directed it, or acquiesced in it when he either knew, or by the exercise of reasonable care should have known of it, and should have objected and taken steps to prevent it."

It is a general rule of conspiracy that each conspirator is responsible for the acts of his associates committed in furtherance of the common design. And each is responsible for everything done by his confederates which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original design.

The question presented is whether there is sufficient evidence to tie these particular defendants in the illegal bidding plan.

The responsibility of the particular defendants must be judged by the principles above stated, as applied to the evidence in this case with respect to the particular conspiracy here charged.

Taking the case of C. W. Ridinger, Sr., President, and Warren I. Bickford, Secretary and Treasurer of the Iron City Engineering Company, corporate defendant,

there appears to be no contest over the fact that the corporation and C. W. Ridinger, Jr., its manager, participated in the collusive bidding of the Electrical Contractors Association. The question is,—Was there sufficient evidence to show that Ridinger, Sr., and Bickford knew of, and participated therein to such an extent as to sustain a verdict against them individually?

Carmack, Secretary of the Electrical Contractors Association, testified as to the working of the collusive-bidding plan of the Association, and its members. He said that in most cases Ridinger, Jr., represented the Iron City Engineering Company in carrying out the bidding plan of the Association. He could not recall that the Senior Ridinger was ever present at a meeting of the Association. Carmack further testified that he had never discussed the bidding plan of the Association with the Senior Ridinger. (Carmack's Test. pgs. 1152-1155). In this connection, there appears in Carmack's statement to the PWA Investigators (P. 58) which was read to the jury, the following:

"Q. Is the Iron City Engineering Company in that bracket?

"A. They are in that bracket, but they don't ever seem to be with us—they don't even seem to be in that bracket. Don't know whether they attend the meetings or not."

(See also Rec. pg. 2166)

It also appears by the evidence that the Senior Ridinger in person signed the bid of the Iron City Engineering Company on the municipal-airport project and the Northside Market project, which bids were submitted on the collusive-bidding plan of the Electrical Contractors Association. At the trial Ridinger, Sr., produced the estimate sheets of his Company on these two projects. (Ex. 302, 303, Rec. pg. 827).

On the witness stand, Ridinger, Sr., when called upon to produce these papers, claimed his constitutional right against giving evidence against himself; but did produce the documents Exhibits 302 and 303, then saying: (Rec. pg. 828) "I might say that I have not been active in this business for about twenty years, and I am not very familiar with these figures. I just had to take what was in the file."

In addition to that, it appears that Ridinger, Sr., signed, in behalf of the Iron City Engineering Company, checks for dues to the Electrical Contractors Association figured on the basis of volume of work done on the Association plan, as reported by the Company. There was introduced such a report of the Iron City Engineering Company signed by Ridinger, Jr., (Ex. 344A) dated January 28, 1938, which showed a volume of business at $18,466.15, and dues payable, $184.66, (Rec. 1131, 1132).

Is the evidence sufficient to sustain a verdict against Ridinger, Sr.? I am of the opinion that it is. The fact that under the Association's plan he signed bids on two projects, and checks for Association dues, certainly shows knowledge on his part of the dealings of his Company with the Association. It certainly could be properly inferred that he must have known, and approved, the dealings of his Company with the Association when he signed bids for these two projects and checks for Association dues. Counsel for defendant contends that Ridinger, Sr., signed the bids for these two projects at the request of his son, the manager of the Company. The evidence does not show that this is so. But, even if he did so sign at the request of his son, the inference might properly be made that his son advised him fully as to the relationship of the Iron City Engineering Company with the Electrical Contractors Association and its bidding plan; that Ridinger, Sr., approved of it and his Company's participation therein.

It is contended, too, that Ridinger, Sr., was only the nominal head of the Iron City Engineering Company, devoting his entire time to the affairs of the Iron City Electric Company (now called the Westinghouse Electric Supply Company).

The testimony of Haines, an employee of this Company, (Rec. pgs. 5343-5344) shows that Ridinger, Sr., and Bickford managed its business. But there is no evidence which shows that Ridinger, Sr., was only the nominal head of the Iron City Engineering Company. In fact, there is no evidence to show how much of his time he devoted to either Company. Ridinger, Sr., might have taken the witness stand and disclosed his entire relationship with the two companies. He did not choose to do so. It would seem, therefore, that the evidence in the case would sustain the verdict of the jury.

As to defendant Bickford, he was secretary and treasurer of the Iron City Engineering Company. Carmack testified that Bickford was present at a hotel meeting of the Association, (Rec. 1152). Carmack also testified that the electric-supply houses agreed to cooperate with the Association in its plans, and that he talked with Bickford, representing the Iron City Electric Company, about the cooperation of that Company (Rec. p. 2144). It may also be noted that Bickford, as secretary of the Iron City Engineering Company, signed the indemnity bond accompanying the bid of that company on the municipal-airport project. It would seem that Bickford's connection with the bidding conspiracy was for the jury, for they might properly infer therefrom that he personally knew of the plan, and participated in it, as far as his company was concerned.

Taking now the case of Robert B. Yates, vice-president of the MacNeil Electric Company. His counsel contend that there was not sufficient evidence to involve him personally with the conspiracy.

Carmack testified that at the meetings Alvin S. MacNeil only represented the corporation, and that he could not recall that Yates ever came in on the bidding plan. (Rec. 1158) However, the record shows that he signed proposals and contracts on projects involved in the plan. Yates himself took the witness stand and denied any personal knowledge or participation in the bidding plan of the Electrical Contractors Association. (Rec. pages 2760, 2767, 2774, 2775).

As Yates signed proposals and contracts on projects awarded his company under the plan, it is our view that the testimony presented an issue to the jury of his participation in the conspiracy.

Counsel for the corporate defendants contend that corporations are not within the sanctions of Sec. 3490 Revised Statutes. This section applies to "Any person not in the military or naval forces." There is one case that supports this contention, i. e., United States v. Kansas Pacific Railway Co., 26 Fed. Cases, No. 15,506. That case involved fraudulent claims against the United States, under Section 3490. Judge Foster held that the restrictions of the statute make it applicable to individuals only, and not to corporations. His reasoning is not sound that the statute refers only to persons capable of being employed in the land or naval forces, or in the militia; and that, as a corporation cannot be employed in such forces, it is not within the provisions of the statute. It seems to me the word "person", as used in this statute, includes corporations, because they are just as much within the mischief aimed at by the statute, as individuals. In fact, Congress has made it plain that the word "person" when used in the Revised Statutes, may be applied to corporations. Title 1, Chapter 1, Sec. 1, of the Revised Statutes, provides: "In determining the meaning of any Act of Congress, * * * the word 'person' may extend and be applied to partnerships and corporations, * * *."

Our view in this respect is supported by *United States v. Union Supply Co.*, 215 U. S. 50; *Interstate Lumber Co. v. United States*, 101 F. (2nd) 477.

The final ground urged by defendants why judgment should be entered in their favor, is that there is not sufficient evidence on which to assess, or by which to measure, any damages. Section 3490, Revised Statutes, provides a penalty of $2000, "and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing of such act."

We charged the jury as to the measure of damages, as follows:

> "The damage to which the plaintiffs would be entitled would be measured by the difference between the contract price paid the contractor therefor in excess of the amount which the United States would have been obliged to pay for the same work, had there been open, competitive and uncontrolled bidding."

And again, in another part of the charge, we said:

> "Now, in computing the actual damage that was suffered on a particular project or particular instance, you would take the contract price for each of the PWA projects as to which testimony was introduced in this case, and then determine what you find to be a fair and reasonable low bid for doing the electrical work on that particular project, had there been fair and open competitive bidding. If that fair and reasonable low bid is lower in amount than the price for which the contract was awarded, the difference between the contract price and the fair and reasonable low bid would be the measure of actual damage suffered by the United States as to that particular project. Then the sum total of the actual damages would make up the total actual damages suffered by the United States. This

amount you would then double to arrive at the damages which would have accrued to the United States by reason of the conspiracy to present false claims against the United States."

We are of the opinion that we correctly stated the measure of damages to be applied by the jury.

The gist of this action is fraud and deceit. The Supreme Court, in *McMullen v. Hoffman,* 174 U. S. 639, 653, dealing with a collusive-bidding case involving a public work, characterized the nature of the case as follows:

> "But in this case there is more even than concealment. There is the active fraud in the putting in of these, in substance, fictitious bids, in their different names, but in truth forming no competitive bids, and put in for the purpose already stated. It is not too much to say that the most perfect good faith is called for on the part of bidders at these public lettings, so far as concerns their position relating to the bids put in by them or in their interest. The making of fictitious bids under the circumstances detailed herein is in its essence an illegal and most improper act; indeed, it is a plain fraud perpetrated in the effort to obtain the desired result."

The damage to be recovered, therefore, would be the money which the Government contributed to each project in excess of what it would have paid, had there been fair and open competition.

This rule was found by the Court of Appeals of New York in People v. Stephens, 71 N. Y. 527, 559, to be applicable where there was fraudulent bidding.

However, the defendants say, that even applying the measure of damage given by the court to the jury, the plaintiffs have proved no facts by which the actual damage suffered by the Government could be determined

with reasonable accuracy. It is the contention of the defendants that, as the grant of the Government placed an absolute limit on the Government's share of the cost of the work,—either 30% or 45%—of the original estimated cost of the project, it cannot be determined what loss, if any, the Government suffered by the fraudulent bidding, without first showing the total cost of the entire project; for, if that cost exceeded the original estimate, The Government would have paid only the agreed percentage of the original estimate, and may not then have suffered any loss by the fraudulent bidding plan of the Electrical Contractors Association.

We cannot follow this argument. Whatever the cost of the entire project may have been, the Government would be damaged so far as the electrical contracts are concerned, to the extent that it contributed to them in excess of what it would have been required to contribute, had there been open and fair competition. We see no merit in this contention of the defendants.

The motion of defendants for judgment non obstante veredicto will therefore be denied.

We will now take up and consider the defendants' motion for a new trial.

Their first proposition is that the defendants should have a new trial, because the verdict is inconsistent in exonerating the defendant Carmack, who, by his own testimony, is a confessed party to the conspiracy charged in the complaint.

The verdict, as tendered by the jury, reads as follows:

> "And now, to wit March 22 1941, we, the Jurors empaneled in the above-entitled case, find the defendants guilty as charged in the indictment and award damages in the sum of Two hundred three Thousand one thousand dollars and ninety one cents (203,100.91) plus the penalty of One hundred twelve thousand dollars Total $315100 91/100 —

The jury absolves Mr Robt C Carmack from damages in this suit

WALTER S. COLMERY—*Foreman*"

On reading this form, the court found it to be in the form of a verdict in a criminal case, and suggested an amendment as to form to comply with the forms of verdict customary in civil cases. This form was then read to the jury; signed by the foreman; and upon a poll of the jury then taken, each juror stated that the verdict was his verdict.

This verdict reads as follows:

"Now, March 22, 1941, we the Jurors empaneled in the case above entitled, find a verdict in favor of plaintiff and against all the defendants except Robert C. Carmak, in the sum of $315,100.91, being $203,100.91 damages and $112,000 penalty, and as to defendant Robert C. Carmak, we find a verdict in his favor.

WALTER S. COLMERY,
Foreman."

This verdict the defendants say was inconsistent and cannot stand. We cannot see that the defendants against whom a verdict was rendered were injured by returning a verdict in favor of Carmack.

This is not a case where the defendants are liable jointly, if liable at all. It is a case where their liability is both joint and several. We cannot, therefore, see that the defendants against whom a verdict was rendered, are harmed by the verdict in this case. The plaintiffs could, of course, complain that the jury should have returned a verdict against Carmack; but his co-defendants could not.

Counsel for defendants themselves recognized that in their thirty-sixth point for charge, which reads as follows:

"36. If the jury finds that any one or more of the defendants did not participate in any unlawful act, the jury should find in favor of such defendant or defendants, even though the verdict be against other defendants."

We did not affirm this point as drawn, but did say to the jury in our general charge as follows:

"If you find that a conspiracy exists as charged, then you will have to determine which of the defendants were parties to that conspiracy. If you find that none of the defendants were involved in the conspiracy charged in this case, then you would return a verdict in favor of the defendants. If, on the other hand, you find that a conspiracy, as charged, exists in this case, you would return a verdict in favor of the plaintiffs and against the defendants involved therein for such amounts of damage and penalty as you would find from the evidence in this case that the plaintiffs would be entitled to, computed according to the measure of damage which I shall now give you."

The instruction we gave the jury is supported by the authorities. In 15 C. J. S., page 1028, the rule is stated as follows:

"Each conspirator is jointly and severally liable for all damage resulting from the conspiracy. * * *"

And again, in 15 C. J. S., Sec. 31 c, it is said, page 1052:

"Against one or more defendants. As a general rule, as the gravaman of the action is the damage and not the conspiracy, as stated supra Sec. 21, a verdict or judgment may be rendered against any one or more of defendants, and in favor of the others, as the rule as laid down in Corpus Juris, which has been quoted and cited with approval, is that if plaintiff fails in the proof of a conspiracy

or concerted design, he may still recover damages against one or more defendants shown to be guilty of the tort without such agreement, and is not entitled to a verdict against defendants whom he does not prove participated in the wrong."

We, therefore, conclude that, in view of the fact that Carmack was a mere employee of the Electrical Contractors Association, a verdict in his favor would not bar a recovery against the other defendants who employed him to carry out the unlawful acts to the damage of plaintiff.

This view is supported by *Strickfaden et al. v. Green Creek Highway District et al.*, 248 Pac. 456, 464; *Whitesell v. Joplin & P. Ry. Co. et al.*, 115 Kan. 53, 222 Pac. 133.

It is our view that the verdict, as first submitted by the jury, was defective and irregular in form; that all the court did was to mold the form of the verdict so as to award damages to the plaintiffs against all of the defendants (except Carmack), which was the evident finding of the jury, as stated in the verdict the jury first proposed.

It has been repeatedly held that the trial court has the power to mold the form of a verdict which has been returned in a defective form. See 64 *C. J.* 1094; *Thompson v. Emerald Oil Co.*, 279 Pa. 321; *Shively v. McDonnell et al.*, 308 Pa. 298; *Commonwealth v. John Mills et al.*, 3 Pa. Super. Ct. 161; *Smullin, Appellant v. Harenski*, 106 Pa. Super. Ct. 453.

We therefore conclude that no error was committed in molding the form of the verdict.

The next reason assigned by the defendants in their motion for a new trial, is that the court erred in rejecting the defendants' offer to prove the actual cost to them of doing the work called for by the contracts on the PWA projects involved in this suit. We cannot see that the actual cost to the contractor of doing the work for

which a contract was awarded to him can have any evidential bearing as to the amount of damages the plaintiffs would be entitled to recover. The question in this case is whether or not the Government paid more for its share of doing this work than it would have had to pay, had there been no fraudulent and collusive bids. If it did, then the Government would suffer damage to the extent that the bid put in on the collusive-bidding plan exceeded what would have been a fair and reasonable bid for the contract work in the open market, had there been no collusive-bidding plan. The plaintiffs offered evidence to show what would have been fair bids for doing the electrical work on the PWA projects involved in this case. The defendants offered evidence tending to show that the bids actually submitted were fair and reasonable. This presented an issue of fact for the jury, which found that the Government had been damaged, and the extent of such damage. The evidence fully sustains the verdict of the jury. The actual cost to defendants of doing the work can have no bearing on that issue. The cases cited by defendants on evidence as to cost of doing this work do not bear on the issues of this case; the facts are entirely different.

Defendants also contend this evidence should be admitted for the purpose of mitigating damages. We cannot conceive how defendants, as wrongdoers, would be entitled to the actual cost to them of doing the work, in order to mitigate the damages.

The next two reasons for a new trial refer to the exclusion of the testimony of Special Assistant to the Attorney General, M. Neil Andrews, and the records in the criminal cases against defendants. This matter has hereinbefore been discussed on defendants' motion for judgment *n. o. v.*; and we need add nothing to what we there said. They present no grounds for a new trial.

The next reason urged is that there can be but one penalty of $2000 under the provisions of Sec. 3490, R. S.

This section, as far as concerns this penalty, reads as follows:

> "Any person * * * who shall do or commit any of the acts prohibited by any of the provisions of Section 5438, Title 'Crimes', shall forfeit and pay to the United States the sum of $2,000, * * *"

As we construe this statute, this penalty would be applicable to the false claims made on each project; and therefore, the plaintiffs could recover $2000 for each such project. Counsel for plaintiffs contended each false affidavit or certificate that was submitted to the PWA administrator, created a liability for the $2000.

There is support for that view in *15 C. J. S.* Sec. 21, page 1031 and 1032, where it is said:

> "The gist or gravamen of the action is not the conspiracy itself, but is the civil wrong, which is done under the conspiracy, and which results in damage to the plaintiff, but it is not necessary that any particular conspirator should have profited thereby. Each tortious act resulting in damages creates an independent, separate cause of action against the conspirators. * * *"

The defendants contend that as there was but one conspiracy charged, there could be but one penalty of $2000.

We could not agree with either party on this issue, for the reason that it is our view that in each project there was a single, false, or fraudulent claim made arising from the collusive-bidding plan. On a review of the case, we are of the opinion that our ruling at the trial was correct.

The next proposition advanced by defendants is that each defendant is liable only for damages on the projects on which he bid. There is no merit in this contention. This is a conspiracy case, where the rule applies that each conspirator is liable for all the acts of his co-conspirators done in pursuance of the conspiracy.

The next point urged by defendants is that the court erred in not applying the rule as to burden of proof applicable to criminal cases. Counsel cite *United States v. Shapleigh*, 54 Fed. 126 (C. C. A. 8). We cannot follow that case. This is a civil action to recover a penalty and damage. The rules governing criminal prosecutions do not apply. *Helvering v. Mitchell*, 303 U. S. 391, 402.

Defendants also raise the question of double jeopardy in their motion for a new trial. We have already covered this matter in our opinion on defendants' motion for judgment *n. o. v.*

The next point made by the defendants is that the court should have affirmed, without qualification, their fifth point, which point and the answer of the court thereto read as follows:

"Defendants' Point No. 5:

'No inference against the defendants may be drawn from the fact that they refused to testify, because in so doing they were merely exercising a right which the United States Constitution gives them.'"

"That point is affirmed. But we say to you, in connection with that, it would have a bearing upon whether or not there was any evidence that would refute the testimony of Carmack, for instance, when no witnesses have taken the stand to deny this testimony; that would be a fact for your consideration.

Upon objection by counsel for both plaintiffs and defendants to this answer to Point 5, we then said to the jury:

"Members of the jury, I have heard counsel with reference to their exceptions to my charge, and I have decided to affirm without qualification the defendants' fifth point, which reads as follows:

" 'No inference against the defendants may be drawn from the fact that they refused to testify, because in so doing they are merely exercising a

right which the United States Constitution gives them.'"

Objection is made that this does not cure the alleged error of the court in not unqualifiedly affirming the fifth point. We cannot see that this is so, for a judge may certainly correct errors in his charge. In 64 C. J. 734, it is said:

> "* * * A judge can modify or correct instructions at his own motion, and recall the jury for such purpose, or to amplify his charge, or to give additional instructions on material issues not covered by the original charge; and he may revoke an instruction when he becomes convinced of an error in a previous ruling. Such modification or correction may also be made on motion of counsel. It is not error for the court, on request, to give a charge explanatory of oral or written charges, and such a charge may be given to correct previous instructions, or to remedy a misleading charge, or to explain the application of a principle law stated in a previous instruction. * * *"

And again, on page 1007 of the same volume, it is said:

> "* * * An error in a charge is, as a general rule, cured where the court subsequently withdraws or corrects it, even though the jury are not told that the first instruction was incorrect. * * *"

We therefore conclude there was no error as to our instructions to the jury on Point 5.

The next reason advanced for a new trial is that the court should have affirmed defendants' 7th point, which reads as follows:

> "7. If the maximum limit of the Federal Government's agreed contribution on any project would have been reached without the alleged excessive amount of the electrical contract, there can be no

recovery of any damages on account of such projects in this case."

We have already discussed this matter in consideration of defendants' motion for judgment *n. o. v.* For the reasons there stated, we are of the opinion that there was no error in the refusal of that point; and that the defendants are not therefore entitled to a new trial by reason of the refusal of that point.

We next consider the refusal of the defendants' 8th point, which reads as follows:

"8. There can be no recovery of any damages because of any payments made upon periodic estimates for partial and final payment, known as I-23 forms, which were submitted by contractors after February 5, 1940."

We see no error in the refusal of this point. Certainly the United States is not to be estopped in matters affecting the powers of government. The PWA administration is a governmental function for the relief of the destitute and the creation and increase of employment; hence, estoppel in this will not apply to the United States.

In 19 Am. Jur. Estopel, page 822, it is said:

"The United States is not subject to an estoppel which impedes the exercise of the powers of government. It is not estoppel to deny the validity of a transaction or agreement which the law does not sanction, nor does an estoppel arise through an act or representation made by an officer or agent without authority to act for the government in the premises."

The cases cited by defendants do not apply to governmental functions.

The next reason urged by defendants for a new trial is that the court erred in refusal of defendants' 9th point, which reads as follows:

"9. There can be no recovery of any penalty or forfeiture on account of any project in which no actual damages have been shown."

Section 3490 R. S. expressly provides for a penalty of $2000, "and in addition, double the amount of damages which the United States may have sustained." This makes it plain that regardless of damages sustained, the United States would still be entitled to recover the penalty. This point refers to instances where the United States withheld payments on account of the discovery of the fraud, so that no actual damage was shown. However, that would not preclude the United States from recovery of the penalty prescribed by Section 3490 R. S.

The cases cited by defendants are not in point, for none of them involved an action by the United States to recover penalties under Sec. 3490 R. S. We conclude that our refusal of this point was correct.

The next assignment of error relates to our refusal of defendants' 10th point, which reads as follows:

"10. Where the United States Government has since February 5, 1940, paid any sponsor an amount in excess of the amount of the percentage of alleged damages to which the Government would be entitled, there can be no recovery on that particular project."

This point is similar to point 8 which we have hereinbefore discussed: We need add nothing to that discussion. There is no merit in this point.

The defendants' reasons for a new trial—numbers 15 to 34 inclusive—refer to the refusal of defendants' points for charge—11 to 26 and 32 to 35 inclusive—asking binding instructions from the court with reference to damages on the several projects enumerated in those points. The issue of fact as to whether any damage was suffered by the United States on these several projects involved in this case was for the jury, as we believe we

have heretofore demonstrated in this opinion. The defendants, in their briefs on motion for a new trial, do not discuss these projects separately, except as to the Woodville County Home project. Their contention in regard to that project is that it was not covered by either of the bidding plans alleged in the complaint.

With this contention we cannot agree. There was ample evidence that there was concerted action to prevent competitive bidding on this project. Collusive bids were submitted by members of the Electrical Contractors Association, to-wit: Hess & Barton, Inc.; Fort Pitt Electric Company; Lord Electric Company, Raphael Electric Company; Franklin Electric & Construction Company; Morganstern Electric Company, Inc. The Hale Electric Company, Iron City Engineering Company, Craig Electric Company, and Sargent Engineering Company took out plans on this job, but did not bid. Other contractors were bribed into not bidding on this project. From the evidence the jury could find that this project fell within the first bidding plan in operation around the years 1935 and 1936, in which members in the higher bidding brackets agreed as to who would get the job. The fact that Hess, of Hess & Barton, Inc., may have bribed other contractors not to bid, would not take this particular project out of the conspiracy.

The rule to be applied is stated in *11 Am. Jur.* p. 549, as follows:

> "The rule of responsibility for the acts of co-conspirators includes acts done before the defendant joined the conspiracy, as well as the acts subsequent to his participation. Whether or not the act done was in furtherance of the common design or whether it was a natural and probable consequence flowing from the execution of the common design is always a question for the jury."

And again on page 580 of the same volume, it is said:

"The connection between the parties having been established, whatever was done in pursuance of the conspiracy by one of the conspirators is considered as the act of all the conspirators; all are equally liable therefor as joint tort-feasors, regardless of whether they were original parties to the conspiracy and irrespective of either the fact that they did not actively participate therein or the extent to which they benefited thereby. * * * Every person entering into a conspiracy already formed is deemed in law a party to all acts committed by any of the other parties either before or after his entrance, in furtherance of the common design."

The next reason urged is that the court erred in not affirming the defendants' 36th point for charge, which reads as follows:

"36. If the jury finds that any one or more of the defendants did not participate in any unlawful act, the jury should find in favor of such defendant or defendants, even though the verdict be against other defendants."

We did, however, cover the matter in our general charge as follows:

"If you find that a conspiracy exists as charged, then you will have to determine which of the defendants were parties to that conspiracy. If you find that none of the defendants were involved in the conspiracy charged in this case, then you would return a verdict in favor of the defendants. If, on the other hand, you find that a conspiracy, as charged, exists in this case, you would return a verdict in favor of the plaintiffs and against the defendants involved therein for such amounts of damage and penalty as you would find from the evidence in this case that the plaintiffs would be entitled to,

computed according to the measure of damage which I shall now give you."

That fully covers the matter referred to in this point, and we are not required to use the exact language suggested by a point. There is no merit in this suggested reason for a new trial.

The next matter raised by defendants is that defendant Carter, because he held a commission as a reserve officer in the military service of the United States, cannot be held liable for a violation of Section 3490 R. S. We cannot agree with this contention. This section applies to "Any person not in the military or naval force of the United States, or in the militia, called into or actually employed in the service of the United States, * * *" As a reserve officer, Colonel Carter maintained his civilian status, and would not be a person in the military force of the United States, unless and until called into active duty. There was no evidence he was on active duty at the time of the commission of the acts complained of in this case. We therefore hold that he was within the terms of this statute.

The defendants next complain that the court erred in admitting in evidence the statement of claim in a suit filed in the Court of Common Pleas of Allegheny County, Pennsylvania, against defendants. This statement was offered for the purpose of showing certain admissions made by some of the defendants upon being served with a copy of the statement of claim in that suit, and for the purpose of showing that the suit was discussed in conference with some of the defendants. We are of the opinion that for the purpose it was offered, this statement was admissible. It must be noted that a conspiracy was charged in this case, and that considerable latitude is permitted. See *15 C. J. S. Conspiracy,* pp. 1043, 1044, where it is stated:

"* * * The fact of the conspiracy may, of

course, be shown by direct evidence, and should be so proved if this character of evidence is available; but since direct evidence is ordinarily in the possession and control of the alleged conspirators and seldom can be obtained, a conspiracy usually is susceptible of no other proof than that of circumstantial evidence, and therefore it is a well-settled rule that proof by direct and positive evidence is not necessary, and that circumstantial evidence, that is, evidence of the acts of the alleged conspirators and of the circumstances surrounding the transaction which is the basis of the charge, is admissible to prove the conspiracy charged, * * *"

"The law permits great latitude in the admission of circumstantial evidence tending to establish a conspiracy, and to connect those advising, encouraging, aiding, abetting, and ratifying the overt acts committed for the purpose of carrying into effect the objects of the conspiracy, as the jury should have before them and are entitled to consider every fact which has a bearing on and a tendency to prove the ultimate fact in issue and which will enable them to come to a satisfactory conclusion. * * *"

"The limits to which evidence of this kind may be admitted rest in the sound discretion of the trial court, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact."

The next charge is that the court erred in admitting in evidence the estimates of the witness Proctor. These were the estimates that Proctor made as to what would have been fair and reasonable bids for the electrical work for each of the projects. These Proctor estimates were identified as his compilation of what would have been a fair low bid for doing the work on these projects. He testified orally as to this compilation, but the papers

themselves were not examined by the jury, with the exception of one estimate which was shown to the jury by counsel for defendants. At the conclusion of the charge there was a discussion as to whether these estimates should go to the jury. We ruled they should not. (See Rec. pp. 5528-5532).

The next reason urged by defendants is that the court erred in not withdrawing a juror and continuing the case, because of remarks of counsel with reference to the plea of *nolo contendere* entered by defendants in the criminal proceedings, and offering no defense therein.

However, counsel for defendants in their opening to the jury mentioned the fact that the defendants pleaded *nolo contendere* to the criminal charges. Likewise, counsel for defense, in final argument to the jury, urged that no admission of liability was to be implied from the fact that defendants had pleaded *nolo contendere* in the criminal proceedings.

In disposing of the motion to withdraw a juror and continue the case, we said to the jury: (Rec. p. 5488):

> "The Court: We decline the motion to withdraw a juror. Counsel may proceed with his argument. The fact that there was a plea of nolo contendere having been mentioned by counsel for the defendants in the course of their argument, counsel I think may discuss that subject. Possibly he went a little further than he should have gone in the discussion of it, because, as I look at it, there is no inference of liability in this case to be drawn from the mere fact that they entered a plea of nolo contendere in the case that was brought against them in the criminal court. This case has to be decided by the jury upon the evidence that is offered before them in this case. My own view is that the matter ought not to have been adverted to by counsel on either side in the course of their arguments."

This I believe was a proper disposition of this motion.

The next reason urged by defendants for a new trial, is that the court erred in refusing to strike out testimony of Proctor as to what would have been a fair low bid for certain of the projects involved in this suit, because it was based on hearsay. There is no merit in this proposition. Proctor testified to his own estimate, as to what would have been a fair low competitive bid for these projects. The fact that Proctor employed Lesterick to assist him in securing price-lists of materials, would not make his testimony hearsay. Proctor certainly could employ a man to assist in preparing his compilation of prices quoted by manufacturers on materials required to do this electrical work. The final result, as given in court, was Proctor's own estimate as to what would have been a fair low bid. The weight to be given that testimony was, of course, for the jury.

Assignments of error, Nos. 41 to 47 inclusive, relate to exceptions taken by defendants to portions of our charge to the jury. Counsel, in their brief, submit no specific argument as to them. As they relate largely to matters that we have elsewhere discussed in this opinion, we do not deem it necessary to discuss again the legal questions involved therein, and merely hold they are without merit.

The next assignment of error relates to defendants' offer to prove their reputations for honesty, fair dealing, and integrity. As we have already held this to be a civil action to recover a civil sanction, this evidence is not competent.

As to assignments of error: No. 49, relating to the comment of the court as to defendants not testifying; No. 50, relating to reformation of the verdict; No. 51, relating to the amount of the verdict; and No. 52, relating to the admission of evidence regarding the County Home at Woodville,—these matters have all been dis-

cussed elsewhere in this opinion. These assignments of error are without merit.

In assignments of error Nos. 53 and 54, defendants raise the question of whether counsel for defendants were improperly limited in their cross-examination of plaintiffs' witness Proctor, the expert called to testify concerning what would have been a fair low bid in the open market for the projects involved in this case. The record will show that counsel for defense devoted a great deal of time to the cross-examination of this witness, covering thoroughly every phase of this witness's testimony in chief. Surely, the time of the court and jury should not be taken up in having this witness refigure these projects in open court.

When this subject was up at the trial, the court then said: (Rec. 3298, 3299)

> "The Court: It is just a question, gentlemen, whether we will take the time to have this witness make this refiguration on the witness stand or whether he may come in with his breakdown and be cross examined about it later. It does not seem to me advisable to spend court time by having him figure here on the witness stand these items which he says he cannot give now, he will have to take some time to refigure it."
>
> "Mr. Eckert: Will Your Honor note us an exception to that ruling?"

We cannot see that the defendants could be harmed by this ruling. If that course had been followed, the defendants then would have had full opportunity to cross-examine the witness Proctor on the figures submitted. This trial lasted from December 2, 1940, to March 22, 1941. It certainly was asking too much for the court and jury to sit idly by while this witness made his computations over again.

The question came up again at the trial. (Rec. pp. 3578-3580), when the witness was asked to recompute

from the plans of one of the projects the amount of wire required. The witness said it would take about sixteen hours to make the necessary measurements on the plans: (Rec. p. 3578). Certainly the court and jury should not be required to sit and watch the witness do this figuring on the witness stand. We cannot see anything in our ruling on these two matters that is inconsistent with substantial justice to both parties. Therefore, even if there be error in our action as to these two matters, no harm has been done. (See Rule 61 of the Rules of Civil Procedure).

On the whole case, therefore, we conclude that the motions for judgment n. o. v., or in lieu thereof, for a new trial, are without merit, and should be denied.

Orders may be submitted accordingly.

Order of Court Denying Motion for New Trial and Refusing Judgment on Reserved Point.

Now, to-wit, this 13th day of August, 1941, in accordance with the Opinion of the Court filed August 12, 1941 the Motion of the defendants

William F. Hess, John R. Williams, Thomas G. Hodgdon, Thomas G. Hodgdon, Jr., C. W. Ridinger, Jr., C. W. Ridinger, Sr., Warren I. Bickford, Edwin C. Carter, James V. Burke, G. L. Craig, William S. Taczanowsky, Ralph M. Morganstern, Max Daniels, Alvin S. MacNeil, Walter C. Gloeckler, Robert B. Yates, H. L. Fullerton, K. K. Wood, Louis H. Berkman, Edward B. Sargent, individually and doing business as Sargent Engineering Company, Charles M. Cronenweth, individually and doing business as Cronenweth Electric Company, William C. Hemmerle, individually and doing business as W. C. Hemmerle Electric Company, James C. Devlin, individually and do-

ing business as Devlin Electric Construction Company, Norman B. Leeke, individually and doing business as Diamond Electric Company, Herbert D. Hale, individually and doing business as H. D. Hale Electric Company, James A. Rodden, individually and doing business as Rodden Electric Company, Richard W. Schindler, individually and doing business as R. W. Schindler Electric Company, Donald R. Ross, individually and doing business as D. R. Ross Electric Company, James H. Stauffer, individually and doing business as Stauffer Electric Company, John W. Craig, individually and doing business as J. W. Craig Electric Company, R. G. Diodati, individually and doing business as R. G. Diodati and Brother, Irwin J. Levinson, individually and doing business as Levinson Electric Company, Bernard A. Ross, individually and doing business as Ross Electric Company, John E. Hale, individually and doing business as Hale Electric Company, Walter F. Weberg and J. R. Walter, individually and as partners, doing business as Fort Pitt Electric Company, Winfield S. Martin and Michael J. Murray, individually and as partners doing business as Martin & Murray, Benjamin Raphael and Israel Raphael, individually and as partners doing business as Raphael Electric Company, Hess and Barton, Franklin Electric & Construction Company, Iron City Engineering Company, Carter Electric Company, Craig Electric Company, G. L. Craig Electric Company, Morganstern Electric Company, Inc., Daniels Electric Construction Company, MacNeil Electric Company, Star Electric & Construction Company, Industrial Electric Company, Electrical Contractors Association of Pittsburgh, Inc.; Lord

Electric Company: Robert N. Morris, individually and doing business as Morris Engineering Company

jointly and severally, heretofore filed on March 31, 1941, for a new trial in the above entitled case, is hereby denied as to all of said named defendants: and in accordance with said opinion the motions of said defendants heretofore filed severally on March 31, 1941, for judgment on reserved point and to set aside the verdict and judgment heretofore entered against them in this case and for judgment in their favor are hereby denied as to each of said defendants.

It is further ordered in accordance with stipulation of counsel this day made in open court, that for the purpose of giving defendants time to perfect appeals in this case and give supersedeas bonds on each appeal that no execution be issued on the judgment herein until September 17, 1941.

PER CURIAM
F. P. SCHOONMAKER,
Judge.

Final Judgment.

March 22, 1941—Pursuant to above verdict, judgment is hereby entered, in favor of Plaintiff and against all Defendants, except Robert C. Carmack in sum of $315,100.91.

G. H. BERGER, *Clerk.*

August 13, 1941. Order of Court filed and entered in accordance with above opinion denying motion for new trial and refusing judgment on reserved point.

Notice of Appeal.

Filed September 19, 1941.

To G. H. Berger, Clerk

Defendants William F. Hess, John R. Williams, Thomas G. Hodgdon, Thomas G. Hodgdon, Jr., C. W. Ridinger, Jr., C. W. Ridinger, Sr., Warren I. Bickford, Edwin C. Carter, James V. Burke, G. L. Craig, William S. Tacianowsky, Ralph M. Morganstern, Max Daniels, Alvin S. MacNeil, Walter C. Gloeckler, Robert S. Yates, H. L. Fullerton, K. K. Wood, Louis H. Berkman, Edward S. Sargent, individually and doing business as Sargent Engineering Company, Charles R. Cronenweth, individually and doing business as Cronenweth Electric Company, William C. Hemmerle, individually and doing business as W. C. Hemmerle Electric Company, James C. Devlin, individually and doing business as Devlin Electric Construction Company, Norman B. Leeke, individually and doing business as Diamond Electric Company, Herbert D. Hale, individually and doing business as H. D. Hale Electric Company, James A. Rodden, individually and doing business as Rodden Electric Company, Richard W. Schindler, individually and doing business as R. W. Schindler Electric Company, Donald R. Ross, individually and doing business as D. R. Ross Electric Company, James H. Stauffer, individually and doing business as Stauffer Electric Company, John W. Craig, individually and doing business as J. W. Craig Electric Company, R. G. Diodati, individually and doing business as R. G. Diodati and Brother, Irwin J. Levinson, individually and doing business as Levinson Electric Company, Bernard A. Ross, individually and doing business as Ross Electric Company, John E. Hale, individually and doing business as Hale Electric Company, Walter F. Weberg and J. R. Walter, individually and as partners, doing business as Fort Pitt Electric Company,

Winfield S. Martin and Michael J. Murray, individually and as partners doing business as Martin & Murray, Benjamin Raphael and Israel Raphael, individually and as partners doing business as Raphael Electric Company, Hess and Barton, Franklin Electric & Construction Company, Iron City Engineering Company, Carter Electric Company, Craig Electric Company, G. L. Craig Electric Company, Morganstern Electric Company, Inc., Daniels Electric Construction Company, MacNeil Electric Company, Star Electric & Construction Company, Industrial Electric Company, Electrical Contractors Association of Pittsburgh, Inc., Lord Electric Company, Robert N. Morris, individually and doing business as Morris Engineering Company, hereby file this their notice of appeal to the United States Circuit Court of Appeals for the Third Circuit from the judgment entered in favor of the plaintiffs and against these defendants in the within case in the sum of Three Hundred Fifteen Thousand, One Hundred and 91/100 ($315,100.91) Dollars, and from the refusal by the Trial Court of their motions for judgment non obstante veredicto and for a new trial.

EUGENE B. STRASSBURGER,
STRASSBURGER & MCKENNA,
WILLIAM H. ECKERT,
SMITH, BUCHANAN & INGERSOLL,
VINCENT BURKE,
CAMPBELL, WICK, HOUCK & THOMAS,
JOHN B. NICKLAS, JR.,
MCCRADY, NICKLAS & HIRSCHFIELD,
Attorneys for Appellants.

Designation of Record on Appeal.

Filed November 8, 1941.

The appellants hereby designate the following portions of the record, proceedings and evidence in the above-entitled case to be contained in the record on appeal:

1. Relevant docket entries.

2. The following pleadings:

a. Complaint.

b. Answer of C. W. Ridinger, Sr. and Jr., Warren I. Bickford and Iron City Engineering Company.

c. Amendment to answer of all defendants.

d. Plaintiffs' reply to the second defense of defendants' amended answer.

e. Second amendment to answer of all defendants.

f. Plaintiffs' reply to the second amendment to answer of all defendants.

3. The following portions of the transcript of the trial proceedings:

Pages of Trial Transcript	Name of Witness or Other Description
8-13	John F. Laboon
24-68	" " "
79-81	A. H. Doering
91-98	" " "
111-188	M. M. Steen
188-206	Joseph J. Mitchell
206-209	M. M. Steen
209-232	A. H. Doering
232-253	Harry Hively
254-265	M. M. Steen
265-272	Harry Hively

Pages of Trial Transcript	Name of Witness or Other Description
273-286½	Louis C. Groshardt
300-310	Alphonse R. Ferrucci
310-327	Paul Hughes
327-346	Walter R. Dripps
346-363	Walter D. Ferree
364-370	Alphonse R. Ferrucci
370-399	William C. Evans
402-418	" " "
418-425	Walter D. Ferree
425-426	Paul Hughes
427-447	Walter R. Dripps
448-464	John C. Deal
465-494	William A. England
503-527	Lena Z. Kenney
528-545	Henry Wadkowski
546-549	Lena Z. Kenney
549-554	Jules Gonze
554-558	E. J. Waldman
559-560	Lena Z. Kenney
560-569	E. J. Waldman
569-578	Charles E. Haag
579-592	John J. Bruce
594-620	Thomas Hartland
621-634	Howard H. McCloskey
634-636	Walter R. Dripps
637-641	E. J. Waldman
641-651	Jules Gonze
652	John J. Bruce
653-673	Harry G. Canning
673-689	John F. Laboon
692-714	William T. Norton
725-734	Thomas Hartland
735-741	Alvin S. MacNeil
749-759	Harry C. Barton

Pages of Trial Transcript	Name of Witness or Other Description
759-763	Max Daniels
764-774	G. L. Craig
775-776	Walter R. Dripps
776-777	William C. Evans
804-808	Richard M. Morganstern
810-817	Edwin C. Carter
825-829	Charles W. Ridinger, Sr.
829-831	Max Daniels
1146-1155	Robert C. Carmack
1450-1463	Lena Z. Kenney
1486-1487	Walter R. Dripps
1488-1489½	H. G. Canning
1544-1545	Paul Hughes
1546-1549	Thomas Hartland
1549-1559	Ralph J. Davis
1564-1567	" " "
1578-1579	William A. England
1596-1599	Henry Wadkowski (By stipulation)
1674-1686	John F. Laboon
1687-1693	Joseph J. Mitchell
1694-1696	Herbert Patterson
1697-1704	William C. Evans
1732-1740	" " "
1795-1796	T. C. Jones (By stiplation)
1796-1801	Joseph J. Mitchell
2164-2167	Robert C. Carmack
2401-2405	Thomas G. Hodgdon, Sr.
2415-2417	Offer of statements by counsel in criminal proceedings
2457-2460	Morris L. Wolf
2465-2483	Earl D. Covell
2622-2623	Martin T. Moran

Pages of Trial Transcript	Name of Witness or Other Description
4784-4786	Mrs. Mary Snyder (Offer)
4930-4932	Offer and exclusion of actual costs
5014-5017	Offer and exclusion of Carter's commissions
5222-5225	John G. Bowman (Offer and exclusion of character evidence
5326-5328	M. Neil Andrews (Offer)
5337-5344	Joseph C. Haines
5364-5365 and the records offered	Offer and exclusion of records in criminal cases
5486-5489	Objection to portion of closing argument of plaintiff's counsel to jury
5490-5526	Charge

4. The following exhibits:

No.	Description
22	Form 230 and first offer of grant to City of Pittsburgh
26	Tabulation of grants on Pittsburgh schools
28	Arsenal Elementary School Contract
29	Banksville Elementary School Contract
30	Burgwin Elementary School Contract
31	Carmalt Elementary School Contract
32	Concord Elementary School Contract
33	Crescent Elementary School Contract
34	Girls Vocational School Contract
35	Miller Elementary School Contract
36	Perry Athletic Field House Contract
37	Prospect Jr. High School Contract
38	Schiller Elementary School Contract

No.	Description
39	South Vocational High School Contract
40	Spring Garden Elementary School Contract
41	Spring Hill Elementary School Contract
43	Washington Trade School Contract
44	West Liberty School Contract
45	Whittier Elementary School Contract
68	Offer and acceptance on Arsenal School
69	Offer and acceptance on Concord School
70	Offer and acceptance on Crescent School
72	Offer and acceptance on Miller School
76	Amended offer and acceptance on Spring Garden School
107	City of Pittsburgh's payment records on West Penn Playground
116	School Building, Chalfant, Contract
119	Seibert School, Ross Twp., Contract
129	Blaw Knox Municipal Bldg. Contract
135	Westinghouse Memorial High School Contract
137	(First one) Form I 23 to City
144	Form 96 on Braddock School
150	Letter from PWA to Braddock School District re withholding
151	(First part) Resolution, approval, etc., on Braddock School
168	Letter from PWA to Crafton Borough re awarding of contracts
169	Resolution of Crafton Borough awarding contracts
184	Filtration Plant, Braddock, Contract
190	Release from Ross to Braddock Borough and letter
197	Shaler Township Softening Plant Contract
206	Kenmawr School Contract
213	(First check) Check of Kennedy Twp. School District to Craig
217	Library School Contract

No.	Description
236	Letter from PWA to N. Fayette Twp. School District re additional funds
245	(One part) Periodical estimate No. 8 on West View School and draft in payment thereof
250	East Ohio Street Grade Crossing Contract
251	North Park Bath House Contract
261	East End Elementary School Contract
264	(One part) Receipt of McKeesport School District dated 5/9/39
265	Form 290 on McKeesport E. E. School
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7. Defendants' points for charge and ruling on each.

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9. Motion of all defendants other than Robert C. Carmack for judgment on reserved points and order of court thereon.

10. Separate motion of C. W. Ridinger, Sr., for judgment in his favor on reserved point and order of court thereon.

11. Motion for new trial.

12. Opinion.

13. Order of court entered August 13, 1941.

14. Final judgment.

15. Notice of appeal with date of filing.

16. This designation.

No. Description

17. Statement of the points on which appellants intend to rely.

WILLIAM H. ECKERT,
EUGENE B. STRASSBURGER,
J. VINCENT BURKE, JR.,
Attorneys for Appellants.

JOHN B. NICKLAS, JR.,
Of Counsel.

Acceptance of Service.

Service of the foregoing designation is hereby accepted this 7 day of November, 1941.

CHAS. J. MARGIOTTI,
MARGIOTTI & PUGLIESE,
JOSEPH H. REICH,
JOSEPH A. ROSSI,
Attorneys for Plaintiffs.

Points to Be Raised on Appeal.

A concise statement of the points on which appellants intend to rely on their appeal in the above-entitled case is as follows:

1. There is no statutory authorization for this suit.
2. The present action subjects the defendants to double jeopardy.
3. The sanction of the Commissioner of Internal Revenue and of the Attorney General is a prerequisite to such a suit.
4. Corporations are not liable under R. S. § 3490.
5. There is not sufficient evidence to sustain the judgment against C. W. Ridinger, Sr., or Warren I. Bickford.
6. Because of the specific maximum limitation upon each PWA grant, the damages cannot be measured.

7. Only one $2,000 penalty may be included in the judgment.

8. The verdict is inconsistent in exonerating Carmack.

9. Defendants' evidence to prove the actual cost of performing the work should have been admitted.

10. Defendants' character evidence should have been admitted.

11. Defendant Carter is not liable because of his military commission.

12. A juror should have been withdrawn because plaintiff's counsel in his closing address to the jury argued that an adverse inference should be drawn from defendants' pleas of *nolo contendere*.

WILLIAM H. ECKERT,
EUGENE B. STRASSBURGER,
J. VINCENT BURKE, JR.,
Attorneys for Appellants.

JOHN B. NICKLAS, JR.,
Of Counsel.

Acceptance of Service.

Service of the foregoing is hereby accepted this 7 day of November, 1941.

CHAS. J. MARGIOTTI,
MARGIOTTI & PUGLIESE,
JOSEPH H. REICH,
JOSEPH A. ROSSI,
Attorneys for Plaintiffs.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

NO. 7841.

UNITED STATES OF AMERICA ex rel. MORRIS L. MARCUS, and MORRIS L. MARCUS in His Own Behalf,

v.

WILLIAM F. HESS et al., Appellants.

APPELLANTS' APPENDIX.

VOL. II.

Appeal from the Judgment of the District Court of the United States for the Western District of Pennsylvania at No. 748 Civil Action.

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VOL. II.

APPELLANTS' APPENDIX.

Revised Statutes, Sections 3490-3494*.

Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

Sec. 3491. The several district courts of the United States, the supreme court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

Sec. 3492. It shall be the duty of the several district attorneys of the United States for the respective

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* Taken from the official edition of the Revised Statutes. They may also be found in 2 Fed. Stat. Ann., (2 ed.), pp. 208-210, and in 6 U. S. Comp. Stat., §§6411-6415.

districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

Sec. 3494. Every such suit shall be commenced within six years from the commission of the act, and not afterward.

Revised Statutes, Section 5438[a].

Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives

[a] Taken from the official edition of the Revised Statutes.

in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars.

The 1908 Amendment to Revised Statutes §5438*.

CHAP. 235—An Act To amend section fifty-four hundred and thirty-eight of the Revised Statutes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That section fifty-four hundred and thirty-eight of the Revised Statutes be, and the same is hereby, amended to read as follows:

"Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any

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* Taken from the official edition of the Statutes at Large, 35 Stat. 555. It may also be found in 7 Fed. Stat. Ann., p. 524.

agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or deilvers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, shall be imprisoned at hard labor for not more than five years, or fined not more than five thousand dollars; and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier under a clothing allowance or otherwise, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall be punished by imprisonment for not more than two years and by a fine not exceeding five hundred dollars."

Approved, May 30, 1908.

Section 35 and a Portion of Section 341 of the Criminal Code of 1909*.

Sec. 35. Whoever shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, shall make or use, or cause to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry; or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; or whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States or willfully to conceal such money or other property, shall deliver or cause to be delivered, to any other person having authority to re-

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* Taken from the official edition of the Statutes at Large, 35 Stat., 1095, 1153, 1159. They may also be found in 7 Fed. Stat. Ann., pp. 523, 989, 990, 996, and in 10 U. S. Comp. Stat., §§10199, 10515. This is part of the Act of March 4, 1909, Chap. 321.

Section 35 of the Criminal Code differed from Revised Statutes, §5438, as amended, in the following particulars, as explained in 7 Fed. Stat. Ann. at p. 524:

"The material alterations made by the section given in the text were the substitution of the initial word 'Whoever' for the words 'Every person who,' and the changes in the form of the words rendered necessary thereby, the insertion of the words 'or both' after the words 'five years,' and the insertion of 'sailor, officer, or person' preceding the words 'under a clothing allowance.'"

ceive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both. And whoever shall knowingly purchase or receive in pledge for any obligation or indebtedness from any soldier, sailor, officer, or other person called into or employed in the military or naval service, any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier, sailor, officer, or person, under a clothing allowance or otherwise, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall be fined not more than five hundred dollars, and imprisoned not more than two years.

Sec. 341. The following sections of the Revised Statutes and Acts and parts of Acts are hereby repealed: * * * sections fifty-four hundred and thirteen to fifty-four hundred and eighty-four, both inclusive;

* * * * * * *

An Act entitled An "Act to amend section fifty-four hundred and thirty-eight of the Revised Statutes," approved May thirtieth, nineteen hundred and eight.

Also all other sections and parts of sections of the Revised Statutes and Acts and parts of Acts of Congress, in so far as they are embraced within and superseded by this Act, are hereby repealed; the remaining

portions thereof to be and remain in force with the same effect and to the same extent as if this Act had not been passed.

The 1918 Amendment to Section 35 of the Criminal Code*.

CHAP. 194—An Act To amend section thirty-five of the Criminal Code of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That section thirty-five of the Criminal Code of the United States be, and the same hereby is, amended to read as follows:

"Sec. 35. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or *any department thereof, or any corporation in which the United States of America is a stockholder,* any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, *or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations,* or make or use or cause to be made or

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* Taken from the official edition of the Statutes at Large, 40 Stat. 1015. Italics indicate new language added by this amendment.

used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry; or whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin, any personal property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder; or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, *or any corporation in which the United States of America is a stockholder,* by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; and whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, or willfully to conceal such money or other property, shall deliver or cause to be delivered to any person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. And whoever shall purchase, or receive in pledge, from any person any arms, equipment, ammunition, clothing, military stores, or other property

furnished by the United States, under a clothing allowance or otherwise, to any soldier, sailor, officer, cadet, or midshipman in the military or naval service of the United States or of the National Guard or Naval Militia, or to any person accompanying, serving, or retained with the land or naval forces and subject to military or naval law, having knowledge or reason to believe that the property has been taken from the possession of the United States or furnished by the United States under such allowance, shall be fined not more than $500 or imprisoned not more than two years, or both."

Approved October 23, 1918.

The 1934 Amendment to Section 35 of the Criminal Code*.

CHAP. 587—Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conecal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, *in any mat-*

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* Taken from the official edition of the Statutes at Large, 48 Stat. 996. Italics indicate new language added by this amendment.

ter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder; or whoever shall take and carry away or take, for his own use, or for the use of another, with intent to steal or purloin, *or shall willfully injure or commit any depredation against,* any property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder, *or any property which has been or is being made, manufactured, or constructed under contract for the War or Navy Departments of the United States;* or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim; and whoever, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, with intent to defraud the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, or willfuly to conceal such money or other property, shall deliver or cause to be delivered to any person having authority to receive the same any amount of such money or other property less than that for which he received a certificate or took a receipt; or whoever, being authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, shall make or deliver the same to any other person without a full knowledge of the truth of the facts stated therein and with intent to defraud the United States, or any department thereof, or any corporaion in which the United States of America is a stockholder, shall be fined not more than $10,000 or

imprisoned not more than ten years, or both. And whoever shall purchase, or receive in pledge, from any person any arms, equipment, ammunition, clothing, military stores, or other property furnished by the United States, under a clothing allowance or otherwise, to any soldier, sailor, officer, cadet, or midshipman in the military or naval service of the United States or of the National Guard or Naval Militia, or to any person accompanying, serving, or retained with the land or naval forces and subject to military or naval law, having knowledge or reason to believe that the property has been taken from the possession of the United States or furnished by the United States under such allowance, shall be fined not more than $500 or imprisoned not more than two years, or both.

Approved June 18, 1934.

Revised Statutes, Sections 3213-3214*.

Sec. 3213. It shall be the duty of the collectors, in their respective districts, subject to the provisions of this Title, to prosecute for the recovery of any sums which may be forfeited by law. All suits for fines, penalties, and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, *qui tam* or otherwise, before any circuit or district court of the United States, for the district within which said fine, penalty, or forfeiture may have been incurred, or before any other court of competent jurisdition; and taxes may be sued for and recovered in the name of the United States, in any proper form of action, before any circuit or district court of the

* Taken from the official edition of the Revised Statutes. It may also be found in 3 Fed. Stat. Ann., (2 ed.), p. 1025, and in 6 U. S. Comp. Stat., §§5937-5938.

United States for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of the said action.

Sec. 3214. No suit for the recovery of taxes, or of any fine, penalty, or forfeiture shall be commenced unless the Commissioner of Internal Revenue authorizes or sanctions the proceedings: *Provided,* That in case of any suit for penalties or forfeitures brought upon information received from any person other than a collector or deputy collector, the United States shall not be subject to any costs of suit.

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA on the relation of MEYER SALZMAN,
Plaintiff,
—against—
SALANT & SALANT, INC.,
Defendant.

In Law 69—214

Plaintiff for his amended bill of complaint, as relator complaining of the defendant, by ALEXANDER SAVANUCK, his attorney, alleges:

For a First Cause of Action.

FIRST: That your relator, MEYER SALZMAN is a citizen of the United States and resides in the County of Kings City and State of New York, Eastern District of New York.

SECOND: That the defendant, Salant & Salant, Inc. is a domestic corporation organized and existing under and by virtue of the laws of the State of New York and

maintains its office and principal place of business at 56 Worth Street, in the Borough of Manhattan, City and State of New York, in the Southern District of New York; that at all times hereinafter mentioned, the officers of the defendant, SALANT & SALANT, INC. were the following: — GABRIEL SALANT, President, AARON B. SALANT, Treasurer, SOL J. WALLACH, Vice President, SOL J. YASPAN, Secretary, and upon information and belief, said officers above named were also directors and stockholders of the defendant corporation.

THIRD: The AMERICAN NATIONAL RED CROSS is an incorporated association existing under and by virtue of an Act of Congress and maintains its principal office in the City of Washington, District of Columbia; the President of the United States is the President of said corporation and the Directors thereof include representatives of the Department of State, Treasury, Navy, War and Justice, each such representative appointed by the President of the United States; that the accounts of said corporation are audited by the War Department of the United States and said American National Red Cross performs certain services assigned to it from time to time by the United States Government and renders its periodic reports to the Congress of the United States.

FOURTH: That this is a relator's action pursuant to Sections 3490, 3491 and 5438 of the Revised Statutes of the United States for damages divisible between the United States Government and the relator in a sum in excess of Three Thousand ($3,000.00) Dollars, predicated upon alleged frauds practiced upon the United States Government in defrauding the United States Government of its property; that the aforesaid sections of the Revised Statutes of the United States read as follows:

"3490. Any person not in the military or naval force of the United States, or in the militia called

into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, titled "Crimes" shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

"3491. The several district courts of the United States, the supreme court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States but shall not be withdrawn or discontinued, without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent."

"#5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used,

any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who with intent to defraud the United States or wilfully to conceal such money or other property, delivers or causes to be delivered to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

The above sections may be found, with certain changes, in Sections 231, 232, 233, 234, 235 *et seq.* Title 31, U. S. C. A.

FIFTH: That heretofore and prior to the commencement of this action the 72nd Congress of the United States, meeting in a period of great stress and desiring to aid those of the citizens of the United States affected by such adverse conditions did, by joint resolution, duly approved by the President of the United States on the 8th day of February, 1933 authorize the designation of the AMERICAN NATIONAL RED CROSS as agent of the United States Government to receive cotton to be manufactured into, exchanged for or disposed of and proceeds used for acquiring cloth or wearing apparel or other articles of clothing, or bedding made of cotton, and distribute same to the needy citizens of the United States; that resolution further provided that such manufacture, exchange or sale shall be without profit to any mill, organization or other person; such resolution further provided that application for such cotton which was at all times the property of the United States Government should be delivered only upon the approval of the President of the United States on such application presented to him and only such amounts as the President may approve.

SIXTH: Acting upon the provisions of the resolutions of Congress above mentioned, the AMERICAN NATIONAL RED CROSS applied for and received certain quantities of cotton, property of the United States Government, and proceeded to convert same into articles of clothing, wearing apparel, etc., as above alleged.

SEVENTH: That thereafter, the AMERICAN NATIONAL RED CROSS publicized its intentions to buy clothing of all sorts with the government owned cotton above alleged, to be distributed in accordance with and the

authority of the resolution of Congress above mentioned.

EIGHTH: That the said cotton, clothing, wearing apparel, etc., into which said cotton was converted, as above alleged, at all times remained the property of the United States Government and was ear marked as such; that the articles of clothing, wearing apparel, etc., were distributed by the American National Red Cross and received by the ultimate recipients of this form of government relief as the United States Government property; that all forms, papers and documents used in the execution of the purposes of said resolution of Congress identified the said cotton and articles into which it was converted as United States Government property; that all directions given by the American National Red Cross to the mills and manufacturers from whom these articles were purchased with the said government owned cotton required such articles to be labeled as government owned property and prohibited the use of any label of the manufacturer, mill or of the American National Red Cross label or insignia which is ordinarily used on articles purchased with American National Red Cross funds; and in accordance with the statute for such cases made and provided, the contracts in question provided that all manufacture or conversion of the cotton must be in free labor plants and not in prison plants.

NINTH: The defendant, SALANT & SALANT, INC., acting upon information mentioned in paragraph "SEVENTH" above, entered into a series of contracts with the AMERICAN NATIONAL RED CROSS for the purchase of some Eighty-eight thousand (88,000) dozen work shirts by the said government agent, the AMERICAN NATIONAL RED CROSS, at prices ranging from Four ($4.00) Dollars to Six ($6.00) Dollars per dozen, wherein and whereby the defendant was to manufacture and deliver to the respective chapters of the AMERICAN NATIONAL RED

CROSS over a period starting from May, 1933 and terminating on or about the month of December, 1933. Said contracts further provided "all merchandise must be manufactured in the plant named in the contract unless specific written authority is given to manufacturer at other locations. No prison labor may be used in this production." In addition to the specific prices for the work shirts as hereinabove mentioned, the United States Government Agent, the AMERICAN NATIONAL RED CROSS, further agreed to pay to the defendant on any unfilled installment of the merchandise in question such actual increases in processing cost as may result to it from possible legislation limiting the days or hours of labor or any other minimum wage legislation, provided the exact proposed increase in price is established to the satisfaction of the United States Government Agent, the AMERICAN NATIONAL RED CROSS and agreed to by it, and the particular contract amended in writing accordingly before the unfilled installments to be affected by such increase are placed in production; and said contracts specifically referred to the Act of Congress above mentioned, disclosed the principal, the United States Government and provided against any profit by any mill, organization or person in the fulfillment of said contract.

TENTH: The defendant, SALANT & SALANT, accepted said contracts and duly entered upon the execution of the terms and conditions by it to be fulfilled under said instruments.

ELEVENTH: The defendant, SALANT & SALANT, INC., failed and neglected to fulfil its terms and obligations by it to be performed under contracts above mentioned, but instead caused about sixty per cent (60%) of the work shirts in question to be manufactured in its prison plants maintained at Rhode Island State Penitentiary, Howard, R. I., Ionia Reformatory, Ionia, Michigan, State

Penitentiary, West Nashville, Tennessee, Reformatory, West Nashville, Tennessee, State Penitentiary, Ford Madison, Iowa, and Missouri State Penitentiary, Jefferson City, Missouri, and arranged an illegal and fraudulent plan wherein and whereby said work shirts so manufactured in the prison factories above mentioned were shipped to the free plants owned and operated by the defendant at Brooklyn, New York, Portland, Michigan, Martin, Tennessee, Lawrenceberg, Tennessee and Scottsburg, Indiana, with instructions to the defendant's agents, servants and employees at such free labor factories that said prison made shirts be repacked so as to remove all indications of prison manufacture and shipped to the respective AMERICAN NATIONAL RED CROSS chapters in accordance with shipping instructions received from the headquarters of said AMERICAN NATIONAL RED CROSS at Washington, D. C. as free labor goods in supposed fulfillment of the obligations of this defendant under contracts above mentioned; and in accordance with this unlawful and fraudulent scheme about sixty per cent (60%) of the work shirts to be delivered under the aforementioned contracts were so manufactured in prison factories, shipped to free factories, there repacked to remove signs of prison manufacture and thereafter shipped to the various chapters of the AMERICAN NATIONAL RED CROSS.

TWELFTH: That by manufacturing the said 60% of the contracts above mentioned, this defendant, SALANT & SALANT, INC., made an illegal profit in the saving it affected to the extent of the difference between the labor charge which this defendant would be compelled to pay if the goods in question were actually manufactured in its free plants and the lesser amount which this defendant actually did pay for labor in its prison plants, or a saving of about One ($1.00) Dollar per dozen, or in all a saving of about fifty-five Thousand ($55,000) Dol-

lars, which saving accrued as an illegal profit and in breach of that part of the contract which specially prohibited the making of the shirts in question in prison factories.

THIRTEENTH: This defendant, SALANT & SALANT, INC., through its agents, servants or employees, did present statements under oath and vouchers to the said agent of the United States, the AMERICAN NATIONAL RED CROSS and did collect monies of the United States on such statements and vouchers, and contrary to the provisions of the above contracts, did defraud the United States Government of the sum of approximately Fifty-five thousand ($55,000.00) Dollars.

For a Second Cause of Action.

FOURTEENTH: Plaintiff repeats, realleges and reiterates each and every allegation contained in paragraphs marked "FIRST", "SECOND", "THIRD", "FOURTH", "FIFTH", "SIXTH", "SEVENTH", "EIGHTH" and "NINTH" of this complaint with the same force and effect as if fully set forth herein.

FIFTEENTH: That during the performance by this defendant of the contracts mentioned in paragraph "EIGHTH" above, the defendant, SALANT & SALANT, INC., signed the Cotton Blanket Code adopted by the cotton industry pursuant to the provisions of the National Industrial Recovery Act and became entitled and empowered by becoming such signatory to the Cotton Blanket Code to pass to the vendee, the United States Government Agent, the AMERICAN NATIONAL RED CROSS, the increased costs it may incur by the reduction of hours of labor and increase of wages of labor in the manufacture of work shirts by it yet to be processed and delivered in accordance with its obligations of the contracts mentioned in paragraph "EIGHTH" above.

SIXTEENTH: Upon information and belief, that this defendant, SALANT & SALANT, INC., although it signed the Cotton Blanket Code as aforementioned, did not reduce the hours of labor or increase the wages of labor of the convict operators in its prison factories, nor did this defendant increase its pay to the respective States, wherein it operated prison factories, for the use of the State's convict labor, yet at the same time this defendant claimed and obtained an increase of about One Dollar and fifty-five cents ($1.55) per dozen on work shirts which it thereafter manufactured in prison factories, claimed and obtained an increase of about One Dollar and fifty-five cents ($1.55) per dozen on prison made work shirts which had already been manufactured, shipped to a free labor plant and there repacked to appear as free factory products, and claimed and obtained an increase of about One Dollar and Fifty-five ($1.55) cents per dozen for goods made in its free labor factories and which were either already completed or partially completed, thereby making and obtaining an illegal profit, obtained by the perpetration of frauds upon the Government of the United States to the extent of about Eighty-five Thousand ($85,000.00) Dollars.

For a Third Cause of Action.

EIGHTEENTH: Plaintiff repeats, realleges and reiterates each and every allegation contained in paragraphs marked "FIRST", "SECOND", "THIRD", "FOURTH", "FIFTH", "SIXTH", "SEVENTH", "EIGHTH" and "NINTH" of this complaint with the same force and effect as if fully set forth herein.

NINETEENTH: This defendant, SALANT & SALANT, INC., in quoting the prices which it obtained in the aforementioned agreements with the United States Agent, the AMERICAN NATIONAL RED CROSS, knowingly and pur-

posely included in said prices, contrary to the written contracts above mentioned and contrary to the Act of Congress above mentioned a sum over and above the actual cost to this defendant of the manufacture of the work shirts in question:

TWENTIETH: That the margin of profit included in the said contracts as mentioned in the next preceding paragraph was about seventy-five cents (.75¢) per dozen, making a total of the entire profit exclusive of the additional profits mentioned in the First and Second Causes of Action herein, a sum of approximately Seventy Thousand ($70,000.00) Dollars.

TWENTY-FIRST: That upon information and belief, this defendant, SALANT & SALANT, INC., through its agents, servants and employees did present statements under oath and vouchers to the said agent of the UNITED STATES, the AMERICAN NATIONAL RED CROSS, and did collect monies of the United States on said statements and vouchers and contrary to the provisions of the above contracts and the Act of Congress did defraud the Government of the United States of the sum of approximately Seventy Thousand ($70,000.00) Dollars.

For a Fourth Cause of Action.

TWENTY-SECOND: Plaintiff repeats, realleges and reiterates each and every allegation contained in paragraphs marked "FIRST", "SECOND", "THIRD", "FOURTH", "FIFTH", "SIXTH", "SEVENTH", "EIGHTH", "NINTH", "TENTH", "ELEVENTH", "TWELFTH", "THIRTEENTH", "FIFTEENTH", "SIXTEENTH", "SEVENTEENTH", "NINETEENTH", "TWENTIETH" and "TWENTY-FIRST" of this complaint with the same force and effect as if fully set forth herein.

TWENTY-THIRD: That the fraudulent acts above alleged were participated in by the officers of the de-

fendant enumerated in paragraph marked "Second" of this complaint, with the exception of SOL J. WALLACH, Vice President of the defendant and the said fraudulent acts and each and every one of them were perpetrated by the defendant and the said officers of the defendant pursuant to a plan, scheme and conspiracy to defraud the government of the United States of its property, to-wit: the government owned cotton or the proceeds thereof which Congress had authorized to be distributed to the distressed and needy citizens of the United States as a form of government relief through the American National Red Cross, and in obtaining and aiding the defendant to obtain payment and allowance of the false and fraudulent claims as above set forth in detail out of the government owned cotton and/or the proceeds thereof.

TWENTY-FOURTH: That by reason of the foregoing, the government of the United States was defrauded by the defendant and its co-conspirators as above alleged of the sum of TWO HUNDRED TEN THOUSAND ($210,000.00) Dollars.

WHEREFORE, Plaintiff demands judgment against this defendant in the sum of TWO HUNDRED TEN THOUSAND ($210,000.00) DOLLARS and appropriate interest, plus TWO THOUSAND ($2,000.00) DOLLARS, plus other statutory penalties, and for such other and different relief as may be proper, together with the costs and disbursements of this action.

MEYER SALZMAN,
Relator.

ALEXANDER SAVANUCK,
Attorney for Plaintiff,
Office & P. O. address,
25 West 43rd Street
Borough of Manhattan
City of New York.
Verified by plaintiff August 8, 1938.

Memorandum.

PATTERSON, D. J.

The original complaint having been found insufficient, the plaintiff served an amended complaint. The defendant moves to dismiss the amended complaint.

In a popular sense the cotton turned over to the Red Cross might be called government cotton, just as ships owned by the Emergency Fleet Corporation were called government ships. But in a legal sense, and it is only in a legal sense that section 5438 of the Revised Statutes can be violated, the cotton was not owned by the government. As the Resolution of February 9, 1933 shows on its face, the cotton was the property of the Cotton Stabilization Corporation to which the government had made loans; the government, by cancelling loans and advancing funds for release of the cotton from other loans, caused the cotton to be donated to the Red Cross for relief of the needy, the cotton to be made into garments by the Red Cross, or exchanged for garments by the Red Cross, or sold and the proceeds used to buy garments. When the Red Cross sold the cotton and devoted the proceeds toward purchase of garments, a seller of garments who presented to the Red Cross false claims for payment did not, within the compass of section 5438, present "to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof" nor did such a seller make or use any false bill, voucher or other paper "for the purpose of obtaining or aiding to obtain the payment or approval of such claim," meaning a claim upon or against the government or a department or officer thereof, nor did such seller "enter into any agreement, combination or conspiracy to defraud the Government of the United States or any department or

officer thereof". See UNITED STATES v. STRANG, 254 U. S. 491.

The allegations in the amended complaint to the effect that the cotton remained the property of the United States and was marked as such, that the money collected by the defendant was money belonging to the United States, and similar allegations are conclusions of the plaintiff which are contrary to the Resolution of February 8, 1933. They are not admitted to be true on motion to dismiss. The amended complaint is insufficient on its face, and the motion to dismiss will be granted.

ROBERT P. PATTERSON,
United States District Judge.

September 2, 1938.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA on the relation of ROBERT A. GILCHRIST and ROBERT A. GILCHRIST in his own behalf, Plaintiffs,
—against—
AMERICAN COTTON COOPERATIVE ASSOCIATION, BUNGE NORTH AEMRICAN GRAIN CORPORATION, et al., Defendants.

L 58/272

Opinion of the Court.

KNOX, D. J.
filed 5/20/35
Op. # 9112

Beyond observing that this complaint asks no more than that plaintiff recover judgment against defendants in the sum of $1,129,533,000.00 with interest, the comprehensive nature of its allegations, and the manner in

which they are averred need not be discussed. It is enough to say that upon the facts set forth in the complaint, plaintiff is not entitled to maintain the suit. The statutes under which a right of action is here claimed have recently been construed by Judge Gibson in Olson v. Mellon, which also bears the designation of United States ex rel Knight v. Mellon, 4 Fed. Supp. 947. The discussion there had was so complete and satisfactory that the Circuit Court of Appeals for the Third Circuit adopted the opinion of the District Court as its own and affirmed the judgment. The interpretation of the law is decisive of plaintiff's lack of legal qualification to bring this action. I see no reason why I should not accept the views to which Judge Gibson gave expression, and grant the motions that are here made to dismiss plaintiff's complaint. Such disposition of the instant action is further fortified by the decisions reached in United States v. Cohn, 270 U. S. 339, 345, and in United States ex rel Boyd v. McMurtry et al. 5 Fed. Supp. 515. See also Capone v. United States, 51 Fed. (2nd) 609.

In consideration of the fact that the complaint is to be dismissed and that plaintiff cannot qualify so as to file another, I am without the necessity of ruling upon defendants' motion that plaintiff be required to file a bond for costs.

Motions to dismiss are granted.

JNO. C. KNOX,
U. S. D. J.

May 20, 1935.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

MARTIN E. MANDEL, as well for himself as for the UNITED STATES OF AMERICA, Plaintiff,
—against—
THE COOPER CORPORATION, et als., Defendants.

Civ. No. 13-387.

Opinion of the Court.

COXE, D. J.:

This is a motion by the defendants to dismiss the complaint for insufficiency, or, in the alternative, for summary judgment in their favor.

The action is brought by an informer under the informer statue (31 U. S. C. A. § § 231-235) to recover forfeitures and double damages for presenting various alleged fraudulent claims to the government for payment. The material portions of the statute are as follows:

> "Any person * * * who shall make * * * or present for payment or approval * * * any claim upon or against the Government * * * knowing such claim to be false, fictitious or fraudulent, or who, for the purpose of obtaining * * * the payment or approval of such claim, makes * * * any false bill, receipt, voucher, roll, account, claim, certificate * * * knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination or conspiracy to defraud the government * * * by obtaining * * * the payment or allowance of any false or fraudulent claim", shall

forfeit and pay to the United States the sum of $2,000.

and, in addition, double the amount of damages sustained. (31 U. S. C. A. § 231).

The complaint alleges that the defendants procured the payment of fraudulent claims against the government in violation of the above provisions. The charge is that the defendants conspired to defraud the government by submitting collusive bids "indentical to the penny", to the procurement division of the government with respect to the rubber tire requirements of the government for three purchasing periods of six months each; that the bids for two of these purchasing periods were accepted by the government, and purchases thereunder were made by various government departments; and that as a result of such collusive non-competitive bids, the government was forced to pay substantially higher prices for its tire requirements than it would have paid had the bids been competitive. It is also charged that the defendants used in support of their claims "false vouchers and receipts" containing "fraudulent statements, to wit, "that the contract prices involved in the claims were not "fixed through collusive bidding". The damage alleged is the difference between the amount of the non-competitive bids and the prices at which the government could have purchased the tires had the bids been competitive.

The action was commenced following the dismissal of a prior action instituted by the government to recover treble damages under Section 7 of the Sherman Anti-trust Act, in which the Supreme Court held that the term "person" used in Section 7 did not include the United States, and that consequently the United States could not maintain the action. *United States vs. Cooper Corp.* 312 U. S. 600. The present complaint is substantially the same as the government's complaint in the anti-trust action, except that general allegations have been added to bring the case within the language of the informer statute.

The complaint makes no charge that the defendants presented false or fictitious claims to the government for payment; it merely alleges that the claims were fraudulent because collusive bids, "identical to the penny", were submitted by the defendants. The claims involved are the ones covering the purchases of the government during the first two purchasing periods; the bids submitted by the defendants for the third purchasing period were rejected by the government, and never ripened into claims at all. With respect to the purchases during the first two purchasing periods, it clearly appears from the affidavits of the defendants that the defendants made no express representations that the prices bid were not the result of any agreement among bidders. I think, therefore, that the allegation of the complaint that "fraudulent statements" were made that "the contract prices involved in the claims were not fixed through collusive bidding" has been disproved, and may be disregarded.

Were the claims of the defendants fraudulent within the meaning of the informer statute? "A fraudulent claim against the government is a false or fictitious claim, gotten up or contrived by some person or persons with the intent to present it for approval and thus to defraud the government". *United States vs. Shapleigh*, 54 Fed. 126, 128. Clearly, the present claims were neither false nor fictitious. *United States vs. Shapleigh* (supra). The fraud alleged is that the defendants submitted collusive, non-competitive bids to the government for its tire requirements. It is also charged that as a result the government was forced to pay more for its tires than it would have paid had the bids been competitive. The bids now assailed became contracts when they were accepted, and, under the contracts, the defendants sold and delivered to the government quantities of tires, for which the government paid the contract prices.

The plaintiff in effect says that the contracts were

induced by fraud. This, if true, would give the government, on discovery of the fraud, a choice of remedies, namely, either (1) to rescind the contracts, restore what had been received, and recover what had been paid, or (2) to enforce the contracts and recover the damages resulting from the fraud. These remedies are antagonistic, and the government could not have them both. *People vs. Stephens*, 71 N. Y. 527; 553; *Wilson vs. New United States Cattle-Ranch Co.*, 73 Fed. 994; *Cheney vs. Dickinson*, 172 Fed. 109. Moreover, a suit by the government for damages for fraud in inducing the contracts would sound in tort and not on contract. *Chanin vs. Chevrolet Motor Co.*, 89 F. (2d) 889.

The present action sounds in tort. It really is an action for damages for alleged fraudulent representations in the procurement of contracts to supply the tire requirements of the government during the periods in question. It is not an action for damages sustained by the government by reason of the presentation for payment or approval of fraudulent claims within the meaning of the informer statute.

It is significant to note that although the informer statute was originally enacted in 1863 (U. S. Stats. at Large, Vol. 12, p. 698), with the exception of *Marcus vs. Hess*, W. D. of Pa. (1941, unreported) no case has been found in which either the government or an informer has sought to recover under the statute because of contracts allegedly procured through fraudulent representations. *Marcus vs. Hess* is plainly distinguishable on the facts.

The motion of the defendants for summary judgment in their favor dismissing the complaint is granted.

December 9, 1941.

(Sgd.) ALFRED C. COXE,
U. S. D. J.

APPENDIX TO SUPPLEMENTAL BRIEF FOR APPELLANT, EDWIN C. CARTER

(Filed Jan. 16, 1942)

APPENDIX.

[476] *Mr. Strassburger* (At Side Bar): For the purpose of showing Mr. Edwin C. Carter, one of the defendants, was in the military forces of the United States during all of the time covered by the complaints alleged, counsel for defendant offer in evidence Defendants' Exhibit D-46, being a commission of the President of the United States of America appointing Edwin Cleveland Carter, Jr. Colonel of Field Artillery in the Army of the United States, dated March 16, 1931, said commission to continue for a period of five years from January 21, 1931; and Exhibit D-47, being a commission of the President of the United States, dated December 23, 1935, commissioning the said Edwin Cleveland Carter, Jr. Colonel of Field Artillery in the Army of the United States for a period of five years beginning January 21, 1936. All for the purpose of showing that the said defendant Carter does not fall within the terms of Section 3490 of the revised statutes of 1874, and cannot be held in this action.

[477] *Mr. Fiok*: The offer is objected to as incompetent, irrelevant, and immaterial; and further, for the reason that these commissions show that Mr. Carter is a reserve officer; for the further reason that the Act under which the plaintiffs are proceeding does not contemplate the inclusion of reserve officers unless and until called into active service.

The Court: It not appearing in the defendants' offer that Colonel Carter was called to active service or was in active service in the United States Army during any of the periods involved in this litigation, we sustain the objection.

Mr. Strassburger: Defendants offer in evidence Exhibit D-48, being a certificate of Major General Grant, by Edwin O. Shaw, Acting Assistant Adjutant General, dated March 26, 1941, to show the

active service of Colonel Carter from July 26, 1925 to July 22, 1939; also showing his service was continuous until January 22, 1940.

The Court: With further reference to the certificate of the Commanding General of the Third Corps Area, showing the military service of the reserve officer, Edwin Cleveland Carter, from November 27, 1917 to the date of his resignation as a reserve officer, and showing also his service during certain periods of active duty training while in the Officers' Reserve Corps, we do not find anything on this certificate which causes us to modify the ruling we have already made. We are of the opinion that the Act referred to has no reference or application to this particular defendant.

Mr. Strassburger: Attention of the Court is called to the fact that Section 3490 of the revised statutes of 1874 says: "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of Section 5438 under the title 'Crimes' shall forfeit and pay", and so forth. This section of the Act we submit does not require proof that Colonel Carter was in the active military service, the active service being confined to the State Militia, and for that reason we again urge that the offer be admitted.

The Court: Hearing the further offer of counsel for defendant in this respect, we are of the opinion that the matters he has called to our attention have no force and bearing upon the application of this Act to the defendant Carter. It does not appear by the evidence in this case that there was any act committed by him or any of the transactions incurred by him were committed, so far as he is con-

cerned, while he was even on active duty for training periods during the time stated in the certificate.

* * * * * * *

Defendants' Exhibit D-47.

THE

PRESIDENT

OF

THE UNITED STATES OF AMERICA

E PLURIBUS UNUM

(Cut of Spread Eagle)

To all who shall see these presents, greeting:

Know Ye, that reposing special trust and confidence in the patriotism, valor, fidelity and ability of EDWIN CLEVELAND CARTER, JUNIOR, I do appoint him Colonel of Field Artillery in

THE ARMY OF THE UNITED STATES

such appointment to date from the twenty-first day of January, nineteen hundred and thirty-six. He is therefore carefully and diligently to discharge the duty of the office to which he is appointed by doing and performing all manner of things thereunto belonging.

He will enter upon active duty under this commission only when specifically ordered to such active duty by competent authority.

And I do strictly charge and require all Officers and Soldiers under his command when he shall be employed on active duty, to be obedient to his orders as an officer of his grade and position. And he is to observe and follow such orders and directions, from time to time, as he shall receive from me, or the future President of the United States of America, or the General or other Superior Officers set over him, according to the rules and discipline of War.

This Commission evidences an appointment in the Army of the United States, under the provisions of section 37, National Defense Act, as amended, and is to continue in force for a period of five years from the date above specified, and during the pleasure of the President of the United States, for the time being.

Done at the City of Washington, this twenty-third day of December, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the United States of America the one hundred and sixtieth.

By the President:

ALFRED J. BOOTH
Adjutant General.

W. D., A. G. O. Form No. 0650 C.
February 1, 1934

Defendants' Exhibit D-48.

HEADQUARTERS THIRD CORPS AREA
UNITED STATES ARMY
Baltimore, Maryland

201-Carter, Edwin Cleveland. March 6, 1941.
-100 (78) f16.

CERTIFICATE

The records of this headquarters show that Edwin C. Carter, Serial Number 0-148818, was on active duty as a reserve officer, from November 27, 1917 to January 27, 1919. He accepted appointment as Major, FA-Res. on March 30, 1919. He accepted promotion to Lieutenant Colonel, FA-Res. on January 11, 1924. Promoted to Colonel, FA-Res. on January 21, 1931; accepted promotion January 27, 1931. Resignation accepted January 22, 1940, per letter, War Dept., same date. He served on the following periods of active duty training while in

the Officers' Reserve Corps: 7-26-25 to 8-9-25; 2-6-27 to 2-20-27; 7-17-27 to 7-30-27; 7-1-29 to 7-14-29; 7-6-30 to 7-19-30; 7-5-31 to 7-18-31; 7-17-32 to 7-30-32; 3-10-33 to 6-14-33; 7-14-35 to 7-27-35; 8-23-36 to 9-5-36; 8-8-37 to 8-21-37; 8-7-38 to 8-20-38; 7-9-39 to 7-22-39. END

By Command of Major General GRANT:

(Signed) EDWIN O. SHAW
Edwin O. Shaw,
Capt., Inf.
Actg. Asst. Adjutant General

APPENDIX TO SUPPLEMENTAL BRIEF FOR APPELLANTS C. W. RIDINGER, SR. AND WARREN I. BICKFORD

(Filed Jan. 16, 1942)

APPENDIX.

[405] CHARLES W. RIDINGER, SR., one of the defendants, produced on behalf of plaintiffs, having been duly sworn, testified as follows:

Mr. Eckert:

Q. Mr. Ridinger, do you claim your constitutional privilege against producing any evidence here or against incriminating yourself?

A. I do.

Mr. Margiotti:

Q. Mr. Ridinger, are you connected with any of the corporations named in this complaint?

A. We bid on two jobs.

Mr. Eckert: I move that be stricken out, as not responsive.

The Court: He may not know who are named in the complaint,—

A. Iron City Engineering Company.

Q. In what capacity are you connected with the Iron City Engineering Company?

A. President.

Q. You have been subpoenaed to produce any papers that you may have that relate to any of these jobs mentioned in the complaint?

A. Yes.

Q. Do you have those papers with you?

A. Yes. (Witness producing papers) I might state we did not have any PWA jobs.

Q. I understand. What papers have you brought?

A. North Side Market—

Q. What else?

A. And Airport. (Witness hands papers to counsel for plaintiffs).

[406] Q. What is the bundle of papers contained in the envelope marked "North Side Market"?

A. That (indicating) is the estimate that was made up on the first bid on the North Side Market.

Q. And what are the papers that you have produced in connection with the Airport?

A. That (indicating) is the estimate sheet that was made up on the first bidding on the Airport.

(Two groups of papers marked respectively Plaintiffs' Exhibits Nos. 302 and 303).

Q. Will you state whether or not, in connection with Plaintiffs' Exhibit 302, which is the estimate in connection with the North Side Market—you have a copy of the bid that was submitted?

A. No; this is the only thing we have—the only records we have (indicating Exhibit 302).

Q. Well, is there anything here that reflects the bid that was made?

A. Those are estimates from the different manufacturers on the items on the bid.

Q. In other words, is this first part your base bid?

A. Yes.

Q. That is the base bid. And does that answer apply to Plaintiffs' Exhibit 303?

A. Yes.

Q. That is on the Comfort Station—

A. No, it is the Airport.

Q. I beg your pardon; that is right, on the Airport. Will you state whether or not there is anything in this file, any paper in this file, showing the bid that was actually submitted to Allegheny County, or to the authority involved in the North Side Market?

A. All that there is the total there of the bid.

Q. Well, is this a base bid (indicating), or is this the bid that went in to the authority?

A. That is the bid that went in to the County.

Q. And does that same answer apply on Plaintiffs' Exhibit 302?

A. Yes. I might say that I have not been active in this business for about twenty years, and I am not very familiar with these figures. I just had to take what was in the file.

Q. Very well. Does your file contain any statement from the Electrical Contractors Association giving to you the bid to be submitted to the sponsor?

A. It does not; there is nothing of that kind.

[407] Q. Nothing of that kind. Has it had any such thing as that in the file?

A. No.

Q. Or in the possession of any officer?

A. Never.

Q. And this is your complete file on that subject?

A. Yes.

Q. On both subjects—pardon me. That is all for the present. Will you produce your checks and stubs, and also your ledger, showing your dues paid to the Electrical Contractors Association?

A. We having had no PWA contracts, we paid no dues to the Association on PWA work.

Q. Well, produce those checks anyhow, and then we will decide on the other one.

A. If we have them. I might explain here—

Q. Did you pay them? Did you pay dues?

Mr. Eckert: I object to this, as beyond Your Honor's ruling. The witness was only to produce records, not to testify.

Mr. Margiotti: That is right.

Q. You produce the checks and the ledger.

A. I might state further—

Q. Never mind; you just produce the checks showing dues paid to the Contractors Association, and the books and records.

(No cross examination).

* * * * * * * *

ROBERT C. CARMACK (DIRECT EXAMINATION).

* * * * * * *

[409] *Mr. Margiotti*:

Q. Mr. Carmack, I want to ascertain from you for each defendant who acted for each particular individual or corporation in carrying out the bid plan which you have testified to on the jobs that were handled through the Association, or attempted to be handled through the Association. The company of Hess and Barton—

Mr. Eckert: If the Court please, this is asking for an opinion on the part of the witness, I submit. All the witness could tell would be the specific facts of what each person did.

Mr. Margiotti: If Your Honor please, what I have in mind is this: there is a question about whether corporations are liable in this case. I personally think they are, because it is a civil case, but that being in question I want to make certain the particular individuals named in this complaint were the persons who acted, were the prime movers for the corporation, and signed the papers; otherwise I would have to take all of these reports and so forth and commence to introduce them for that purpose. If we can reach some agreement on that—I don't think there is any question about who represented each particular group, who acted for them. It is coming out in the evidence pretty generally, but I want to get it settled once and for all, so we don't have to refer to it again. I would like to get it handled that way, but otherwise I can take each specific case, and every time Hess and Barton is mentioned can say who represented them.

Mr. Eckert: This is asking for an opinion. It isn't stating a specific fact.

Mr. Margiotti: It is a fact. He knows who came in there and acted for each person.

The Court: I suppose you would have to ask what each particular individual defendant did in relation to the Association. In a measure, the question as you propounded it is partly a question of fact, but still it calls for a conclusion of this witness.

Q. Mr. Carmack, I will take each one of the defendants. Will you state by whom was Hess and Barton represented at the meetings?

Mr. Eckert: If Your Honor please, that certainly is the same question, and subject to the same legal objection.

Mr. Margiotti: That is certainly a question of fact—who represented Hess and Barton. It appears in the minutes "Hess and Barton present." The corporation wasn't there. You don't expect the seal of the corporation to be there. Who was there?

The Court: What do the minutes show?

Mr. Margiotti: It just gives the name of the corporation time and time again.

[410] Q. Isn't that right?

A. Not always.

Mr. Margiotti: I will withdraw that question.

Q. Will you state what part, if any, William F. Hess played in connection with the business of Barton and Hess which was carried out through you through the plans which you have mentioned?

Mr. Strassburger: That is objected to for the same reason.

Mr. Margiotti: I will change the form of that question.

Q. What, if anything, did William F. Hess have to do in any of the business of Barton and Hess carried on through the Association by means of the bid plan or plans which you have referred to?

A. Mr. Hess was the man that I always—or rather, who contacted me on the bidding plan.

Q. Of who?

A. Of Hess and Barton. Mr. Barton attended some meetings or golf games or parties or something of that sort; but as far as the business was concerned, Mr. W. F. Hess contacted me on that.

Q. And the same question with reference to Edward B. Sargent and the Sargent Electric Company.

Mr. Strassburger: That is objected to. Who acted for the Sargent Electric Company? Putting them together that way, Mr. Margiotti is suggesting the answer.

Mr. Margiotti: I am taking the same question and mentioning Sargent and the Sargent Electric Company.

Mr. Strassburger: He shouldn't suggest who represented the corporate defendant.

Mr. Margiotti: I am not suggesting it.

Q. What, if anything, did Edward B. Sargent have to do with the submission of bids or the carrying out of the plan or plans on bidding in those cases where Sargent Electric Company appeared?

Mr. Strassburger: Are you assuming Sargent Electric Company is a corporation?

Mr. Margiotti: I am not assuming anything. I am stating it as it appears in the books—Sargent Electric Company. He is the owner. I know that.

A. Sargent was the principal contact man in this case. He has a man in the office by the name of Weisman who, in a couple of instances, came in and contacted while Mr. Sargent was out of the city.

Q. What was Mr. Weisman's first name?

A. I couldn't say. I should know, but I have forgotten.

Q. Now, the same question with reference to R. N. Morris and the Morris Engineering Company.

A. R. N. Morris owned it.

[411] Q. And your answer is the same as to Morris

with reference to that company as it has been with reference to the other two?

A. That is right.

Q. The same question with reference to John R. Williams and the Lord Electric Company of New York City.

Mr. Strassburger: The point is, he is suggesting Mr. Williams represented the Lord Electric. I think he did, as a matter of fact, and I am not objecting in that case for that reason, but I don't see why he should suggest who acted for the particular company. Let him ask who represented it.

Mr. Margiotti: I object to your statement that I am making suggestions to this witness. I am asking him what, if anything, he had to do with the Lord Electric Company. You have admitted in the statement he was the vice president of the Lord Electric Company. There is no suggestion.

The Court: I think the question is correct. We overrule the objection.

A. J. R. Williams was the contact man.

Q. Walter F. Weberg and J. R. Walters in connection with the Fort Pitt Electric Company.

A. Walter Weberg in most cases, and in a couple of instances Joe Walters.

Q. Thomas G. Hodgdon and Thomas G. Hodgdon, Jr. in connection with the Franklin Electric and Construction Company.

A. Both have contacted my office.

Q. Benjamin Raphael and Israel Raphael in connection with the Raphael Electric Company.

A. Both.

Q. C. W. Ridinger, Sr. and Warren I. Bickford and C. W. Ridinger, Jr. in connection with the Iron City Engineering Company.

A. Junior Ridinger in most all cases. I can't recall of the Senior ever being in the office. I recall of a meet-

ing in the hotel where Mr. Bickford was present, and that is the answer to that.

(A short recess was taken at this point)

Q. Mr. Carmack, I believe we were discussing the names of C. W. Ridinger, Sr., Warren I. Bickford, and C. W. Ridinger, Jr. in connection with the Iron City Engineering Company.

Mr. Margiotti: As I recall, Your Honor, paragraph 4, referring to the various names and their connections with these companies, I believe was admitted. If it wasn't, I will have to establish a relationship in each company. What I have in mind particularly to do—for instance, as we have set forth the respective positions of the parties, Warren J Bickford was and is Secretary and Treasurer.

[412] *The Court*: The allegations of fact contained in paragraph No. 4 of the complaint are admitted.

Q. We have been discussing these three names in connection with the Iron City Engineering Company. I believe you said something about generally it was Ridinger, Jr. Did you complete your answer on that? Did Mr. Ridinger, Sr. attend any meetings at all?

A. Mr. Ridinger was never in my office.

Q. Will you state generally or not whether you know, whether there were any facts from which you can determine whether Mr. Ridinger, Sr. had knowledge of the plan?

Mr. Strassburger: Objected to.

The Court: We sustain the objection.

Q. Was Mr. Ridinger present at any meetings where the plan was discussed?

Mr. Strassburger: We object to that. He said he was never in his office.

Mr. Margiotti: I am talking about meetings. Meetings can be anywhere besides his office.

Mr. Eckert: I object to that as leading, too, Your Honor.

The Court: It can be asked whether C. W. Ridinger was ever present at a meeting any place else.

Mr. Strassburger: At which he was present.

Mr. Margiotti: Which the witness knows about, whether he was present or not.

The Court: No.

Mr. Margiotti: Supposing Mr. Ridinger told him, wouldn't that be evidence?

A. I don't recall of Mr. Ridinger, Sr. ever being present.

Q. Did you ever have any discussion with Mr. Ridinger concerning the plan?

Mr. Strassburger: I object to that as cross examining his own witness. He said definitely Mr. Ridinger was not there. Now he is trying to cross examine his own witness to develop that the answer is not correct.

Mr. Margiotti: You don't know the nature of the question. You don't appreciate it. I am trying to find out whether Mr. Ridinger had any knowledge of the plan.

Mr. Strassburger: I don't know how a man can have a discussion with a man if they never came together.

[413] *Mr. Margiotti*: He didn't say they never came together. He said he never came to his office.

The Court: Find out if he is acquainted with Mr. Ridinger, Sr.

Q. Are you acquainted with Mr. Ridinger, Sr.?

A. Very well.

Q. Have you ever had any discussion with Mr. Ridinger, Sr. concerning the plan?

A. No.

* * * * * * *

CROSS EXAMINATION.

Mr. Eckert:

* * * * * * *

[2164] Q. Well, now, did you testify in September, 1939 as follows—page 57:

* * * * * * *

[2166] Q. Is the Iron City Engineering Company in that bracket?

A. They are in that bracket but they don't ever seem to be with us—they don't ever seem to be with that bracket. Don't know whether they attend the meetings or not.

* * * * * * *

[2167] [*Mr. Eckert*]:

Q. Did you so testify?

A. Yes.

Q. Well, isn't what you said then correct?

A. To my best knowledge and belief.

* * * * * * *

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[480] JOSEPH C. HAINES, a witness produced on behalf of the defendants, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

Mr. Nicklas:

Q. You are Joseph C. Haines?

A. That is correct.

Q. Where do you live, Mr. Haines?

A. Pittsburgh.

Q. And with what company are you connected?

A. With the Westinghouse Electric Supply Company, or formerly the Iron City Electric Company.

Q. And were you with the Iron City Electric Company in 1938, October?

A. That is correct.

Q. What was your work there?

A. I was identified with the lighting department on sales work.

Q. And in connection with your duties in the lighting department, was it part of your work to study plans and specifications for furnishing lighting equipment to meet those plans and specifications?

A. That is correct.

* * * * * * *

CROSS EXAMINATION.

[482] *Mr. Margiotti*:

Q. Who is your present superior?

A. I mentioned that I was employed by Westinghouse Electric Supply Company; Mr. Bickford is the local district manager.

Q. Bickford? And he is one of the defendants in this case?

A. I read the papers, and—

Q. Well, just answer the question. Is he the same man?.

[483] *Mr. Strassburger*: The record speaks for itself.

Q. Well, is it the same man? There are a lot of Mr. Bickfords, I assume.

A. Well, you are referring to Mr. Bickford who is a defendant?

Q. Well, is the defendant the same man who is your superior, your boss?

A. That is right.

Q. That is what I want to know. Is Mr. Ridinger, Senior, connected with your company?

A. Yes, Mr. Ridinger is at the company; he has been there continuously.

Q. Is he one of your superiors?

A. Yes, I suppose he is in a way.

Q. And were both of these men, Ridinger, Senior, and Mr. Bickford, your superiors in connection with the Iron City Electric Company?

A. That is right; Mr. Ridinger was president of the Iron City Electric Company.

Q. And at that time you folks were engaged in selling supplies to contractors?

A. That is right; we were one of the electrical supply companies over a period of years in the city of Pittsburgh.

* * * * * * *

RE-DIRECT EXAMINATION.

Mr. Eckert:

Q. Do you know how long Mr. Bickford and Mr. Ridinger have been managing the Westinghouse Electric Supply Company and before that the Iron City Electric Company, as it was called then?

[484] A. Well, the Westinghouse Electric Supply Company—or rather, it was known as the Westinghouse Electric Supply Company effective March—well, just two years ago.

Q. Well, did you listen to the question: I asked you as to both—not what the company is called now, but previously as the Iron City Electric Company.

A. Well, the Iron City Electric Company was in business some thirty years as an electric supply jobber.

Q. And were Mr. Bickford and Mr. Ridinger the active managers of that throughout its existence?

A. That is correct.

* * * * * * *

SUPPLEMENTAL APPENDIX TO REPLY BRIEF FOR APPELLANTS RIDINGER AND BICKFORD

Exhibit No. 721

(Filed Feb. 27, 1942)

SUPPLEMENTAL APPENDIX.

Exhibit No. 721.

TABULATION OF

ALLEGHENY COUNTY HOME

PWA 4242

J. LAWRENCE HOPP · REGIST
5-8 THIRD AVENUE · PITTSBVR

	CONTRACTORS	PROPOSAL GUARANTY	EXTENDED PRICES	CERTIFICATE OF COMPLIANCE	CONTRACTOR'S EXPERIENCE QUESTIONNAIRE	CONTRACTOR'S PLAN AND EQUIPMENT QUESTIONNAIRE	CONTRACTOR'S FINANCIAL STATEMENT	BASE BID	PROJECT #1 Nick Pinckney Department	PROJECT #2 Nursery Elementary	PROJECT #3 College for Supply, T.B.	PROJECT #4 Hospital Unit	PROJECT #5 Farm Colony Unit and Barns			PROJECT #6 Laundry	PROJECT #8 Maid Bldg. No. 18	Subtracting for Alt. A. (1)
													Farm Colony Unit	Barns	Farm Colony Unit and Barns			
GENERAL	MELLON STUART							1,537,450	304,500	213,900	62,700	132,600	167,000	104,100	311,100	98,850	44,200	13,250
	W.P. TRIMBLE & SONS							1,555,000	347,000	224,000	62,000	135,000	171,000	108,000	313,000	100,000	48,000	12,000
	EDWARD H. CANON																	
	DAVID T. RIPPLE							1,949,085	405,911	280,571	71,417	162,772	193,343	167,759	341,122	117,019	47,000	15,677
	CHARLES T. WILLS, INC.																	
	NICOLA BUILDING CO.																	
	DURGWIN CLARKSON & CO.																	
PLUMBING	GEORGE H. SOFFEL CO.							268,649	47,655	38,967	9,684	23,000	22,592	14,798	39,190	29,664	8,260	1,936
	HOGG & BLAKELEY PLUMBING CO.																	
	HOPKINS, SMITH, & HOPKINS CO.																	
	W.N. SAUER CO.							297,823	46,142	32,945	9,941	24,000	24,784	14,277	39,060	21,593	9,149	1,979
	WELDON & KELLY CO.							347,000	49,000	40,800	10,200	31,000	26,000	14,800	41,200	26,200	10,900	2,100
								289,419	48,270	41,454	9,999	25,033	24,980	15,084	40,064	25,935	9,249	1,741
HEATING	GEORGE H. SOFFEL CO.							267,974	52,537	28,709	7,987	13,044	24,322	12,000	32,984	24,887	8,679	1,110
	HOPKINS, SMITH, & HOPKINS CO.							281,182	62,500	25,560	8,099	12,454	21,990	13,780	35,130	22,497	5,970	1,185
	W.N. SAUER CO.							298,000	64,000	24,800	8,100	13,000	21,200	13,400	34,600	21,000	5,100	1,200
	GRAHAM PIPING CO.							339,000	63,100	25,900	9,000	13,000	21,000	20,000	41,000	23,500	4,900	1,160
ELECTRIC	HESS & BARTON INC.							395,444	53,709	14,134	4,082	8,970	10,448	9,384	19,749	13,277	2,325	796
	FORT PITT ELECTRIC CO.							481,922	58,445	16,700	4,194	9,195	14,960	10,576	24,589	15,762	2,990	650
	LORD ELECTRIC CO.							429,179	58,640	15,483	4,800	9,290	14,197	9,610	23,807	14,800	2,610	680
	HALE ELECTRIC CO.																	
	IRON CITY ENGINEERING CO.																	
	RAPHAEL ELECTRIC CO.							430,106	53,490	17,191	4,598	8,410	13,006	9,673	22,679	14,782	2,841	779
	FRANKLIN ELECTRIC & CONSTR. CO.							416,341	53,094	14,854	4,492	8,650	14,100	9,194	19,294	13,927	2,293	660
	CRAIG ELECTRIC CO.																	
	FERGANSTEIN ELECTRIC CO.							428,216	53,100	17,406	4,611	9,170	12,408	8,900	21,893	15,000	2,805	696
	SARGENT ENGINEERING CO. INC.																	

· TABULATION · OF · BIDS ·

PLAINTIFFS EX. 721
2/7/41 H.F.

COVNTY · HOME · WOODVILLE · PENNSYLVANIA

· J · LAWRENCE HOPP · REGISTERED ARCHITECT ·
J · 5^8 THIRD AVENVE · PITTSBVRGH PENNSYLVANIA · T ·

APRIL · 8 · 1935

PROJECT #3 Village Bar Laundry, T.B.	PROJECT #4 Hospital Unit	PROJECT #5 Farm Colony Unit	PROJECT #5 Farm Colony	PROJECT #5 Barns	PROJECT #6 Laundry	PROJECT #6 Steel Fire Escapes	PROJECT #8 Dwellings for Members of the Medical Staff Dwg. A (2)	PROJECT #8 Dwg. B (1)	PROJECT #8 Dwg. C (2)	PROJECT #8 Dwg. D (2)	PROJECT #8 Total (6)	PROJECT #10
62,700	132,000	147,000	104,100	311,100	95,890	44,200	13,250	12,250	24,100	24,100	73,700	24,000
63,000	138,000	171,000	148,000	319,000	100,000	48,000	12,000	12,000	24,000	24,000	72,000	24,000
71,017	142,772	193,343	167,799	361,122	117,019	47,000	13,677	13,281	27,600	27,600	86,161	34,511
9,656	23,468	22,392	16,730	39,190	26,666	8,260	1,936	1,969	3,807	3,871	11,325	44,941
9,241	24,000	24,784	14,277	39,060	21,980	9,149	1,878	1,450	2,730	2,818	8,419	34,981
10,200	31,000	25,400	14,800	41,200	24,200	10,900	2,100	2,000	3,800	3,800	11,700	88,000
9,599	25,035	24,700	13,600	40,000	25,535	9,249	1,761	1,697	3,351	3,472	10,221	42,600
7,957	15,000	20,322	12,000	35,900	20,087	8,678	1,110	930	1,670	1,733	5,450	34,069
8,899	18,000	21,950	13,200	38,130	22,497	8,970	1,155	1,039	1,960	1,980	6,080	98,100
8,100	17,800	21,200	13,000	36,600	21,000	8,100	1,200	1,100	2,000	2,000	6,300	112,800
9,000	19,000	21,000	20,000	41,000	25,000	8,900	1,165	1,015	1,980	1,980	6,000	139,000
4,028	8,990	10,468	9,386	19,749	13,277	3,825	750	608	1,226	1,014	3,779	293,977
4,196	9,139	13,968	10,876	21,389	15,762	3,930	680	610	1,284	1,000	3,544	330,346
4,500	9,250	11,197	9,610	20,807	14,200	3,610	680	710	1,330	1,356	4,076	321,965
4,596	8,410	13,000	9,679	22,679	14,762	3,841	775	719	1,480	1,100	3,810	334,941
4,482	8,850	13,400	9,094	23,274	15,962	3,398	665	665	665	665	3991	317,787
4,611	9,170	12,400	8,900	21,303	13,900	3,805	630	630	630	630	3,816	323,368

In The
UNITED STATES CIRCUIT COURT OF APPEALS
For the Third Circuit

No. 7841

United States of America, ex rel. Morris L. Marcus, etc.,
vs.
William F. Hess, et al.,
Appellants.

Before Maris and Goodrich, Circuit Judges.

Upon consideration of the petition of Thurman Arnold, Assistant Attorney General, filed February 12, 1942, it is ordered that the prayer of the said petition for leave to file a brief as amicus curiae on behalf of the United States in the above entitled cause be, and the same is hereby granted.

It is further ordered that, the request of counsel for appellee to postpone the argument in this case in order to give them time to answer the said brief of the United States be granted, and that the argument of this case be set for Monday, March 2, 1942, and that all proceedings in the above entitled cause, by way of execution or otherwise, be stayed until the further order of this court.

ALBERT B. MARIS,
Circuit Judge.

February 13, 1942

Order granting Petition of the United States to File Brief as Amicus Curiae; Staying Proceedings, etc.

Received & Filed February 13, 1942
WM. P. ROWLAND, *Clerk.*

In The
UNITED STATES CIRCUIT COURT OF APPEALS
For the Third Circuit

No. 7841 October Term, 1941

United States of America, ex rel. Morris L. Marcus, and Morris L. Marcus in his own behalf,
Appellees,

vs.

William F. Hess, et al.,
Appellants.

And afterwards, to wit, the 2d day of March, 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable William Clark, Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 23d day of March, 1942, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

(14)

In The
UNITED STATES CIRCUIT COURT OF APPEALS
For the Third Circuit

No. 7841 October Term, 1941

United States of America ex rel. Morris L. Marcus, and Morris L. Marcus in his own behalf,
Appellees,

vs.

William F. Hess, et al.,
Appellants.

Appeal from the Judgment of the District Court of the United States for the Western District of Pennsylvania.

OPINION

(Filed March 23, 1942)

Before CLARK, JONES and GOODRICH, *Circuit Judges*

CLARK, *Circuit Judge*

We share appellees' righteous indignation at the conduct of the appellants. In fact their own counsel made no attempt in his argument to us to justify that conduct. We cannot, however, share appellees' views of the applicable statute. The facts are not in dispute and may be simply stated. Federal funds were granted under the Public

Works Administration to local municipalities and school districts in Allegheny County, Pennsylvania to be expended in public-works projects. The appellants, the officers and members of the Electrical Contractors Association of Pittsburgh, conspired to rig the bidding on these projects. The pattern of the collusion was the informal and private averaging of the prospective bid which might have been submitted by each appellant. An appellant chosen by the others would then submit a bid for the averaged amount and the others all submitted higher estimates. The government was thereby defrauded in that it was compelled to contribute more for the electric work on the projects than it would have been required to pay had there been free competition in the open market. A verdict against the appellants was had in the sum of $315,100.91, which consisted of $203,100.91 damages (being double the actual damages found by the jury) and $112,000 penalties ($2,000 penalty for each violation of the statute). The defendants' motions for a new trial and judgment non obstante veredicto were refused. These motions were on various grounds. The learned District Judge discussed principally two: the scope of the pertinent statute and the question of double jeopardy. As we think he erred as to the first, it is unnecessary to pass on the others. We may say that we have already given some consideration to the question of civil sanctions and double jeopardy.[1]

The plaintiff-appellee is an informer. In other words he is the "any person" referred to in the statute.[2] The fact

[1] Mauch v. Commr., 113 F. (2d) 555.

[2] "Any person not in the military or naval forces of the United States or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight Title 'CRIMES' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit." R.S. §3490.

that he is manifestly any person does not completely solve his difficulty. He must also establish the relevancy of the statute. In terms it reads:

> "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any *claim* upon or against the Government of the United States, or any department or officer thereof, knowing such *claim* to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such *claim*, makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, *claim*, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent *claim*." Revised Statutes §5438 (italics ours).

In a companion section of the Revised Statutes[3] some of the present functions of the Department of Justice were delegated to the people at large. Private persons were empowered to prosecute frauds against the United States through informer actions.[4] Thus any person may sue another who commits "any of the acts prohibited by any of

[3] ". . . Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent."
R.S. §3491.

[4] These provisions were derived from the Act of March 2, 1863, 12 Stat. 696, Chapter 67, repealed by R.S. §5596. For general discussions on these actions see 23 Am. Juris., Forfeitures and Penalties §61; 25 C.J., Fines, Forfeitures and Penalties §84.

the provisions of section fifty-four hundred and thirty-eight." [5] Section 5438 was repealed in 1909.[6] Since the amendments to its successor[7] were not incorporated into the provision creating liability in informer actions, these amendments may not be invoked in qui tam suits.[8]

Qui tam actions have always been regarded with disfavor:

> "It is wrong for a free country to allow an informer to seek redress for his own pecuniary advantage in respect of a public wrong in which he has no direct personal interest or concern. A wrong to the State should surely be atoned for by a penalty payable to the State alone. . . . The origin of the practice whereby private persons can exploit the wrongs of others goes back into English history. Penal actions of this sort arose generally because men doubted whether the eyes of the primitive State were sufficiently watchful and its arm sufficiently long to discover and punish offenders. In a few cases of later date the legislature may have distrusted the zeal of the executive. . . .
>
> "The golden age of the informer was the Tudor period. In Sir William Holdsworth's *History of English Law*[9] reference is made to the long line of sixteenth-century statutes in which the common informer was given the penalties recovered by his energy, and collu-

---

[5] R.S. §3490.

[6] Section 341 of the Act of March 4, 1909, c. 321, known as The Criminal Code of 1909, 35 Stat. 1095, 1153, 1159. An amendment to R.S. §5438 by the Act of May 30, 1908, c. 235, 35 Stat. 555 is not material to this case.

[7] Section 35 of The Criminal Code of 1909 as amended by Act of October 23, 1918, c. 194, 40 Stat. 1015 constitutes 18 U.S.C.A. §§80 and 83. Further amendments made by Act of June 18, 1934, c. 587, 48 Stat. 996 and Act of April 4, 1938, c. 69, 52 Stat. 197.

[8] Olson v. Mellon, 4 F.Supp. 947, aff'd sub nomine U.S. ex rel. Knight v. Mellon, 71 F. (2d) 1021; U.S. ex rel. Kessler v. Mercur Corp., 13 F.Supp. 742, 743 aff'd 83 F. (2d) 178.

[9] Volume IV, pages 355 et seq.

> sive proceedings by friends of culprits were treated as 'covinous' and therefore no bar against a genuine informer's suit. The system gradually provoked resentment abong the niany who were 'unjustlie vexed and disquieted by common informers' and this class found a powerful champion in the great Sir Edward Coke. In his *Third Institute of the Laws of England* he describes informers as '*turbidum hominum genus*', and as ranking among the 'viperous vermin who endeavoured to have eaten out the sides of the church and commonwealth'. By their diligence in setting penal actions on foot they impoverish 'chiefly the poorer sort for malice and private ends'. Coke's influence caused a marked decline in the statutory recognition and encouragement of common informers. Probably the Crown recognized that it paid better to take the penalty for itself. Coke expressed this view in more dignified words: 'The King cannot commit the sword of his justice or the oil of his mercy concerning any penal statute to any subject."
>
> Hurst, The Common Informer, 147 Contemporary Review 189, 190.

That dislike has been implemented in court decisions for informer statutes have been construed with utmost strictness. Informers wishing to recover under them must adhere to the exact language of the statute.[10]

The statutory language here important authorizes recovery only where the defendants presented a "claim upon or against the government of the United States or any department or officer thereof."[11]. Plaintiff would have us believe that the statutory words "presents . . . . a claim upon or against" are synonymous with "commits a fraud upon". This argument is refuted both by legislative history and by

[10] Ferrett v. Atwell, 8 Fed. Cas. No. 4747. Cf. U.S. v. Kansas Pac. Ry. Co., 25 Fed. Cas. No. 15,506; U.S. v. Shapleigh, 54 Fed. 126.

[11] R.S. §5438.

grammar. The Senator in charge of the bill said in introducing it:

> "This bill has been prepared at the urgent solicitation of the officers who are connected with the administration of the War Department and the Treasury Department. The country, as we know has been full of complaints respecting the frauds and corruptions practiced in obtaining pay from the Government during the present war; and it is said, and earnestly urged upon our attention, that further legislation is pressingly necessary to prevent this great evil. . . ."
>
> The Congressional Globe, 37th Cong., 3d Sess., Dec. 1, 1862—March 9, 1863, at p. 952.

That the Honorable Senator from Michigan was guilty of no overstatement is apparent from the histories of the times:

> "The government was cheated without conscience in its purchases of military supplies. A committee of the War Department in 1862 exposed frauds of $17,000,000 in contracts amounting to $50,000,000.[12] The Michigan legislature formally charged that 'traitors in the disguise of patriots have plundered our treasury', and James Russell Lowell, agreeing, asserted, 'Men have striven to make the blood of our martyrs the seed of wealth.' The term, 'Shoddy aristocracy', came to signify those who reaped fortunes out of government con-

[12] The report of this committee says:

"He cannot be looked upon as a good citizen, entitled to favorable consideration of his claim, who seeks to augment the vast burdens, daily increasing, that are to weigh on the future industry of the country, by demands upon the treasury for which nothing has been rendered. . . Worse than traitors in arms are the men who pretend loyalty to the flag, feast and fatten on the misfortunes of the nation, while patriot blood is crimsoning the plains of the South and bodies of their countrymen are moldering in the dust."

Report of the House Committee on Government Contracts, March 3, 1863.

tracts, particularly from supplying the soldiers with inferior clothing."

Hockett, Political and Social Growth of the American People 1492-1865, 759.[13]

"Necessity, haste and carelessness can explain the acceptance of a great many of these contracts and a very great deal of inferior goods. But a large amount of blame must go to a horde of government-paid officials who, either through criminal negligence or criminal collusion, permitted or encouraged this robbing of the government treasury and cruelty to the American soldier . . . Accused inspectors passed the blame on to those letting the contracts, the latter blamed the contractors, and the contractors in turn contended that they furnished goods according to specification. . . Such wide publicity was gained by this complicity of public officials in the early contracting business that one of the very first acts of the extra session of Congress in 1861 was to institute an investigation of the existing practices and conditions. . . . The committee discovered an astounding amount of illegal and fraudulent activities, in some instances calling into question the honor or good judgment of men high in political and military councils of the country."

1 Shannon, Organization and Administration of the Union Army, 56-58.[14]

To the word "claim" has been attributed several legal meanings. It is used as an equivalent for "cause of ac-

[13] For an account of the frauds in "bounty-jumping" and "pension-grabbing" see Hockett, supra at 733 and Schlesinger, Political and Social Growth of the American People 1865-1940, p. 111.

[14] One enterpriser bought defective rifles from the government for $17,486 and immediately resold them to a different quartermaster for $109,912. See Josephson, The Robber Barons, 61.

tion",[15] "debt"[16] "demand",[17] "existing right"[18] and "unadjudicated obligation".[19] Through them all however runs the sense of something owing from one party to another. The statement of the facts upon which that obligation is asserted to depend is of course false, but if true would spell out something like an action of assumpsit or debt. It is something quite different to rely on facts which never could give rise to a promise, express or implied, to pay however amply they demonstrate a cheat. The authorities cited by the plaintiff were all cases decided under statutes which used such phrases as "for the purpose of defrauding the United States"[20] and "to defraud the United States".[21]

The plaintiff seeks to come within the statutory words by stressing the fact that the periodical estimates for partial and final payment were presented to an officer of the P.W.A. This fact does not surmount the requirement that the claim must be one "against the United States Government or a

[15] Foust v. Munson S.S. Lines, 299 U.S. 77.

[16] Holden v. Stratton, 191 U.S. 115; Coats v. Arthur, 5 S.D. 274, 58 N.W. 675.

[17] U.S. v. Rhodes, 30 Fed. 431; In re Heim's Estate, 166 Misc. 931, 3 N.Y.S. (2d) 134.

[18] Supera v. Moreland Sales Corp., 82 P. (2d) 963.

[19] In re Frank's Estate, 154 Misc. 472, 277 N.Y.S. 573.

[20] Criminal Code §28, 18 U.S.C.A. §72 (Madden v. U.S., 80 F. (2d) 672; Criminal Code §35, 18 U.S.C.A. §§80-86 (U.S. v. Kapp, 302 U.S. 214).

[21] Criminal Code §37, 18 U.S.C.A. §88 (U.S. v. Carlin, 259 Fed. 904; Belvin v. U.S., 260 Fed. 455; Langer v. U.S., 76 F. (2d) 817; U.S. v. Harding, 81 F. (2d) 563). U.S. v. Bowman, 260 U.S. 94; U.S. v. Mellon, 96 F. (2d) 462; U.S. v. Greenbaum & Sons, 123 F. (2d) 770 and U.S. v. Schor, 13 F. Supp. 309 were brought under a portion of Section 35 of the Criminal Code which provides: "Make . . . any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States." Kay v. U.S., 303 U.S. 1 concerned a prosecution under 12 U.S.C.A. §1467 which provides: "Whoever makes any statement, knowing it to be false, or whoever wilfully overvalues any security, for the purpose of influencing in any way the action of the Home Owner's Loan Corporation or the Board."

department or officer thereof." The question is not merely to whom is something presented, it is also what is presented. A claim against the United States means "a right to demand money from the United States."[22] The defendants at no time had such a right. The defendants' contracts were exclusively with the local municipalities. Neither the United States of America nor any of its departments, officers or agencies was a party to said contracts. No promise was made by the United States Government nor any department or officer thereof to pay the defendants for their work. Nor was any specific fund prescribed by the defendants' contracts for their payment. Since the local municipalities were the only parties who promised to pay the defendants, the defendants could look solely to this source for payment. Where the local municipalities obtained the funds to pay the contractors was immaterial as between the contractors and the defendants. The claims of the defendants then were simply against the local municipalities. Since the defendants had no claim upon or against the United States, this action was not authorized by the informer statutes.

We wish to make it quite plain that our decision herein has no bearing whatever on ultimate restitution. In so far as the United States or the municipalities concerned have been defrauded, suit can be brought and the injured made completely whole. Furthermore, any defendants who are guilty can be punished by more than financial penalty—they can be sent to jail.

So much for the appellants—the United States as amicus curiae contends that the plaintiff was without statutory authority to prosecute this action. The government argues

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[22] Hobbs v. McLean, 117 U.S. 567, 575; 7 Words & Phrases 392. See also U.S. ex rel. Kessler v. Mercur Corp., 13 F.Supp. 742, 743, aff'd. 83 F. (2d) 178, 181, cert. denied 299 U.S. 576; U.S. ex rel. Saltman v. Salant & Salant, 41 F.Supp. 196; U.S. ex rel. Gilchrist v. American Cotton Cooperative Ass'n et al. (L. 58-272 S.D. N.Y.) (unreported). Cf. U.S. v. Cohn, 270 U.S. 339, 345-346; Mookini v. U.S., 95 F. (2d) 960, 961.

that the right of an informer to sue under Section 3491 of the Revised Statutes has been repealed by subsequent congressional enactment. The repeal is alleged to have impliedly occurred as a result of the Reorganization Act of 1933.[23] This Act declares its purpose to be the reduction of governmental expenditures and the increase of governmental efficiency. It of course makes no reference to informer actions. By its provisions the President is empowered to regroup and transfer the functions of any executive agency. Pursuant to his authority the President promulgated an order which reads part:

> "The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States, and of defending claims and demands against the Government, and of supervising the work of the United States attorneys, marshals and clerks in connection therewith, *now exercised by any agency or officer*, are transferred to the Department of Justice."
>
> Executive Order No. 6166, Section 5, June 10, 1933 (italics ours).

The government contends that the foregoing order confers upon the Department of Justice the duty of prosecuting all claims on behalf of the United States. If this interpretation is accepted, the executive order conflicts with Section 3490 of the Revised Statutes under which the present action was instituted. Since Section 3490 was enacted seventy years prior to the order, it is contended that the earlier statute has been impliedly repealed. A declaration of implied repeal, however, is not a matter which a court will undertake lightly. Courts have never looked upon implied repeals with favor.[24] The presumption is always against

[23] Act of March 3, 1933, c. 212, Section 16; 47 Stat. 1517.

[24] U.S. v. Nice, 268 U.S. 613; U.S. v. Greathouse, 166 U.S. 601; In re Martin, 75 F. (2d) 618.

the intention of the legislature to repeal by implication.[25] An English authority has summarized the rule thusly:

> "Repeal by implication is never to be favoured; and when the repeal is not express, the burden is on those who assert that there is an implied repeal to show that the two statutes cannot stand together."
>
> Beal, Cardinal Rules of Legal Interpretation 525.

And our American writers say:

> "Repeals by implication are not favored. This means that it is the duty of the court to so construe the acts, if possible, that both shall be operative. . . . One statute is not repugnant to another unless they relate to the same subject and are enacted for the same purpose. . . When there is a difference in the whole purview of two statutes apparently relating to the same subject, the former is not repealed."
>
> Sutherland and, Statutes & Statutory Construction §247.
>
> "The inconsistency or repugnancy between two statutes necessary to supplant or repeal the earlier one, must be more than a mere difference in their terms and provisions. There must be what is often called 'such a positive repugnancy between the provisions of the old and the new statutes that they cannot be reconciled and made stand together.' In other words they must be absolutely repugnant, or irreconcilable."
>
> Crawford, Statutory Construction §311.[26]

Applying this test we find that the executive order is not at all repugnant to or irreconcilable with Revised Statute Section 3491. The subject matter of the presidential

[25] Bookbinder v. U.S., 287 Fed. 790.

[26] See also 59 C.J. Statutes §508; 25 R.C.L. Statutes §§168-171; Repeal or Amendment Implied From Later Inconsistent Enactment, 37 Columbia Law Review 292.

decree is the transfer of functions within the executive agencies of the government. It does not by its terms encompass any claims which may be asserted by individuals for the government, as is done in informer actions brought under Revised Statute Section 3491. The words we italicized in the order quoted above make this clear. The order expressly provides that its application is limited to claims prosecuted by some governmental "agency or officer." "Agency or officer" as used in the order is obviously a shortened reference to and is synonymous with the words "executive agency or officer" in the authorizing statute. Plaintiff does not come within the statutory definition of an "executive agency" since it cannot be classified as a "commission, independent establishment, board, bureau, division, service, or office in the executive branch of the Government." Since the order neither relates to the same subject matter nor was enacted for the same purpose as Revised Statute Section 3491, the Government's thesis of implied repeal is without foundation. Nor is the government's argument bolstered by a reference to the Act of February 10, 1939 which provides:

> "No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced."
>
> 26 U.S.C.A. §3740.

This provision is a part of the Internal Revenue Code and relates only to those qui tam actions brought under the revenue laws.[27] It was derived from Revised Statute Section 3214[28] which existed side by side with the statute under

[27] See 26 U.S.C.A. §3745.

[28] Section 3213 of the Revised Statutes is the provision authorizing qui tam actions in enforcing revenue laws. By its context then section 3214 referred only to revenue enforcement actions.

which this action was begun.[29] The two sections of the Revised Statutes are consistent since one refers to informers actions under the revenue laws only and the other to all remaining informer actions. Each therefore is operative.

The judgment of the District Court is reversed and the cause remanded for further proceeding in accordance with this opinion.

A true copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[29] See Olson v. Mellon, 4 F. Supp. 947.

In The

UNITED STATES CIRCUIT COURT OF APPEALS

For the Third Circuit

No. 7841 October Term, 1941

United States of America, ex rel. Morris L. Marcus, and Morris L. Marcus in his own behalf,

Appellees,

vs.

William F. Hess, et al.,

Appellants.

On appeal from the District Court of the United States, for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the cause is remanded to the said District Court for further proceeding in accordance with the opinion of this court.

WILLIAM CLARK,
Circuit Judge.

March 23, 1942.

Endorsements:

Order Reversing Judgment, etc.
Received & Filed Mar. 23, 1942
Wm. P. Rowland, *Clerk.*

In The

UNITED STATES CIRCUIT COURT OF APPEALS

For the Third Circuit

No. 7841 October Term, 1941

United States of America, ex rel. Morris L. Marcus, and Morris L. Marcus in his own behalf,

Appellees,

vs.

William F. Hess, et al.,

Appellants.

ORDER AMENDING OPINION

Before CLARK, JONES and GOODRICH, *Circuit Judges.*

And now, to wit, March 26, 1942, it is ordered and directed that the printed opinion filed in the above entitled matter on March 23, 1942, be and the same is hereby amended as follows:

By striking out on page 2 the matter contained in footnote 2 and by substituting in lieu thereof the matter contained in footnote 3 on page 3;

By substituting the word "the" for "a" between the words "In" and "companion" in the first line of the body of the opinion immediately following the quotation on page 3, and by substituting for the matter in footnote 3 on page 3 the words "R.S. §3491";

By substituting "may" for "is" in the last line of the body of the opinion on page 7, and by inserting the word "be" after the words "of course" in that same line;

By correcting the spelling of the word "authorities" in the fourth line of the body of the opinion on page 8;

By substituting the words "local municipalities" for the word "contractors" in the ninth line from the top of the body of the opinion on page 9, and by inserting the word "in" between the words "reads" and "part" in the body of the opinion in the third line from the bottom of page 9;

And by striking out the word "and" in the body of the opinion in the third line from the top of page 11.

As hereinabove corrected and amended the opinion heretofore filed is reaffirmed and approved.

By the Court,
WILLIAM CLARK,
Circuit Judge.

United States of America
Eastern District of Pennsylvania } Set.
Third Judicial Circuit

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendices to the Briefs for Appellants, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of United States, ex rel. Morris L. Marcus, etc., Appellees vs. William F. Hess, et al., Appellants, No. 7841, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 30th day of March in the year of our Lord one thousand nine hundred and forty-two, and of the Independence of the United States the one hundred and sixty-sixth.

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

(Seal)

IN THE

United States Circuit Court of Appeals

For the Third Circuit

No. 7841

UNITED STATES OF AMERICA, ex rel. MORRIS L. MARCUS, and MORRIS L. MARCUS in His Own Behalf

v.

WILLIAM F. HESS et al.,
Appellants.

APPELLEES' APPENDIX

Appeal from the Judgment of the District Court of the United States for the Western District of Pennsylvania at No. 748 Civil Action.

CHARLES J. MARGIOTTI,
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APPELLEES' APPENDIX

(Consisting of Pertinent Testimony Contained in Transcript of Designated Portions of Trial)

(Note—References are to pages of Transcript of Designated Portions of Trial)

JOHN F. LABOON

Direct Examination

(p. 8):

Q. Do you have any knowledge yourself as to the method of payment of the contract?

A. Yes, sir.

Q. What was that method?

A. We provided in our contracts—and we always do, as a matter of fact—for payment on the basis of monthly estimates—

Mr. Eckert:

Q. You are talking about the County's payments?

A. That is right. Under our arrangement, our resident engineer estimates the amount of work which the contractor has completed during the current period, whether that is a month or two weeks—it is usually a month, and so stipulated, the time is stipulated. In the case of PWA contracts, such as this one here under discussion, the Homestead High Level Bridge, the estimate of our resident engineer was submitted to the local official representing the PWA, who then approved it and it was placed in order for payment.

2a

John F. Laboon—Direct

. . . . . .

(p. 9):

Q. You have stated that PWA approved your estimates before payments were made to the contractors. Is that right?

A. That is correct.

. . . . . .

(p. 9):

Q. But in these cases, before payment was given on the estimates, before your estimates were given out to the contractor, you required his cooperation in submitting this affidavit, or whatever it was, with refefence to the employment, the number of employees—

A. Payroll.

Q. And when necessary you also required him to give you bills and other information, in order to make out your estimates intelligently?

A. That is correct.

Q. And did that apply generally to all your contracts?

A. Yes, sir.

. . . . . .

(p. 10):

Q. Now, you have stated that PWA approved your estimates before payment was made to the contractor. Did PWA approve anything else in connection with your electrical contracts?

A. They usually approved the plans and specifications.

Q. The plans and specifications that you gave out?

A. That is right. They were sent to Harrisburg, in the beginning, and usually came back with their approval and ready for advertising.

Q. That is the PWA office in Harrisburg?

A. That is right.

Q. Maintained there by the Government?

A. That is right.

Q. And what else did they approve?

A. Well, preliminary—you mean—to letting the contract?

Q. Yes.

A. Well, then, of course they approved the contract documents and the bond, and checked those things..

Q. And would you let a contract without the approval of PWA?

A. No, sir. We would let a contract, but the contract could not be executed—let us put it that way. The Commissioners could, on my recommendation, for instance, award a contract subject to the approval of PWA, and then PWA would have the opportunity to approve or disapprove the low bidder, and it was then in order for final execution.

* * * * * * * * *

Redirect Examination

(pp. 24, 25):

Mr. Margiotti:

At this time we offer in evidence Plaintiff's Exhibit No. 9, being a photostatic copy of the notice of publication in the Homestead High Level Bridge. May I read this exhibit, Your Honor?

(Counsel for Plaintiff reads Exhibit 9, as follows:)

"COPY OF NOTICE OF PUBLICATION

"ALLEGHENY COUNTY DEPARTMENT OF WORKS

Pittsburgh, Pennsylvania,
February 2, 1937.

"Separate and sealed proposals will be received at the office of the County Controller of Allegheny

4a

John F. Laboon—Redirect
Pltff's Ex. No. 9

County, Pittsburgh, Pa., until 10:00 o'clock a. m., Eastern Standard Time, Thursday, February 25, 1937, and will be publicly opened and read one hour later by the Allegheny County Commissioners, for the following:

"Pittsburgh-Homestead High Level Bridge Electrical Contract, No. 206. This work to be done consists of furnishing and erection of the conduits for the bridge lighting and a system of navigation lights. The contract documents may be viewed at Room 502 County Office Building, Pittsburgh, Pa. Blueprint copies of the contract plans, copies of proposal documents and specifications may be obtained at the same place upon payment of $2.00 per set. No refunds will be made. Each bidder is required to file with his proposal a certified check to the order of the County of Allegheny in the amount of ten per cent of his bid. Each bidder shall accompany his proposal with a list of plant and equipment, a performance record, and a statement of his financial condition, as required in 13-1 of the Instructions to Bidders. The project is being financed in part with funds furnished by the Federal Emergency Agency of Public Works, and the requirements of PWA Form 188, dated August 12, 1935, and the amendments thereto, together with all other requirements of the Federal Emergency Administration of Public Works, must be complied with. Attention of bidders is particularly called to the requirement of conditions of employment to be observed. The minimum wage rates which shall be paid on these contracts are as follows: Skilled labor $1.20 per hour, semi-skilled and other classes of labor as called for in the contract documents."

. . . . . .

(p. 27):

Q. And when you testified before that after you had made your monthly estimates of the work done, and that had been checked by the PWA inspector on the job, that you then put the requisition through for payment. You mean payment by the County; is that right?

A. That is right.

Mr. Margiotti:

Q. But were those payments made, unless approved by PWA?

A. No, sir.

Q. Will you state whether or not the projects were supervised by PWA?

A. They were.

Q. Did they have their supervisors—their inspectors on the job?

A. Yes, sir.

A. H. DOERING

Direct Examination

(p. 33):

Q. Will you state whether the offers were all the same with reference to terms, or was there some difference in them?

A. They are all practically the same. I know of no case different outside of the Market House. I cannot qualify on the Market House.

Q. Now I notice—I will just take one example. I will take an offer dated June 24, 1938, from the Federal Emergency Administration of Public Works, and it says: "City of Pittsburgh, Pittsburgh, Allegheny County, Pennsylvania." The subject is "Terms and Conditions, P. W. A.

6a

M. M. Steen—Direct

Form No. 230 as amended to the date of the offer—" That is this printed form that is attached to the offer?

A. That is right.

Q. "—which are made part hereof. The United States of America hereby offers to aid in financing the construction of Field Houses and Comfort Stations, including necessary equipment therefor, herein called the Project, by making a grant to the City of Pittsburgh, Pennsylvania, herein called the Applicant, in the amount of forty-five per cent of the cost of the Project upon completion as determined by the Federal Emergency Administrator of Public Works, but not to exceed in any event the sum of $82,965.00. By acceptance of this offer the Applicant covenants to begin work on the Project as early as possible, but in no event later than eight weeks from the date of this offer, and to complete such Project with all practical dispatch, and in any event within eight months from the commencement of the construction. United States of America, Federal Emergency Administrator of Public Works." Signed, "H. A. Gray, Assistant Administrator." That is the form of offer in each one of the cases?

A. That is right.

* * * * * * * *

M. M. STEEN

Direct Examination

* * * * * * * *

(pp. 40, 41):

Mr. Strassburger:

Q. Mr. Steen, what do you mean by the "Portion of Government Grant for Electrical Work"?

A. The Government grant was based upon an estimate of cost of the entire project, which had to be substantiated by individual detailed estimates of general work, heating and plumbing, and the electrical—

Q. This allocation that is made on this schedule is your allocation and not the Government's?

A. No; the Government then sent us a recapitulation of the grant, and they said, for instance, so much money—we will say twenty-five thousand dollars or twenty-four thousand dollars—for electrical will be allowed in the grant; and forty-five per cent of that amount would be the actual grant money under that allocation of allowance.

. . . . . .

(p. 45):

Q. And on the question of payment to the contractor, was that done upon estimates made to the School Board?

A. The contractor turned in estimates for payment, which were checked by our inspectors in the field, and were checked by the resident engineer inspector furnished by the Public Works Administration in the field also. When those were properly certified to as being correct, they then came in and passed under my signature finally, and were then sent over for payment.

Q. Then before there was any payment to any contractor, it was required that he furnish these estimates in writing?

A. Yes. The estimates were prepared on a special form that was for that purpose.

. . . . . .

(p. 46):

Q. All right. Will you state whether or not an affidavit was required in connection with the contracts?

. . . . . .

(p. 47):

Q. (Question read).

A. The affidavits were not required by the PWA. They sent forms of affidavit to us, and the provision was

that the owner, the sponsor of the project, could require them if he deemed fit, if he saw fit to.

. . . . . .

(p. 60):

Q. Therefore the Government's grant to the School Board was forty-five per cent of the amount that you estimated and that they approved as the cost of the electrical work?

A. The amount that they approved as the cost of the electrical work on estimate basis, not the amount they approved on bid basis; but on estimate basis, it is true. May I explain that, to clarify everybody's mind on it? Suppose we estimated a job was going to cost $24,000, and the Government might come along and say, "Well, we feel it will only cost twenty-three"—or "we think it will cost twenty-five"; they might change our estimate to some extent, but it is still an estimate. But whatever that estimate is, the grant forty-five per cent is based upon it, and not upon what you might spend. You might spend fifty thousand dollars for that job—or, to make it less ridiculous, thirty thousand, or run over six thousand. Then you wouldn't get forty-five per cent of the six thousand you overran on your estimate, you only get it on what they approve as the proper estimate.

. . . . . .

(pp. 60, 61):

Q. And then the Government granted you forty-five per cent. of your total estimated cost?

A. Yes; but they were very specific in saying we must have a detailed estimate of each of these branches,—not as to the recap of what the electrical cost is, but a detailed take-off of these branches, to indicate what these individual things were going to take; because they weren't going to give you forty-five per cent blind on a total, it

had to be substantiated with figures their engineers checked; and then they took our plans and specifications and they had engineers to check them to see whether they thought our estimates were proper or not. If they didn't think so, they changed it, and then they reallocated sums of money against those various divisions of the grant request, and finally came back and said on this basis of allotment or control estimate—they said, "Now, your grant is made up by using these sums of estimated moneys against individual items"; and that is the basis upon which the grant is controlled.

Q. But the grant was forty-five per cent of the total estimated cost. Isn't that right?

A. Yes, it was.

Q. And no specific sum was granted for electrical work or for plumbing work, or for any other division of the work. Isn't that right?

A. Only in so far as you would say a specific amount was estimated for that work, and it would follow that forty-five per cent of it would be grant upon that work; but they didn't state across from it so much grant, so much grant, and then add them all up; they did check us upon the final total cost.

(p. 61):

Q. And if, for example, the electrical work cost less than you originally estimated in applying for the grant, you could use what you had left over, you might say, above your estimate of the cost of electrical work from the Federal grant for the plumbing work or the construction of the building. Isn't that right?

A. You could, if they would permit you to. I would like to clarify one statement I just made, when I said that offer of grant was in terms of the whole thing, as one blanket offer. Of course, you realize that it says that this

is made in conformity with their Document No. 230, or whatever that is—

. . . . . .

Redirect Examination

. . . . . .

(p. 72):

Q. Will you state whether or not these contracts were submitted to the PWA for approval?

Mr. Eckert:

I object to that.

The Court:

We will overrule that objection.

A. They were approved by the PWA.

Q. How is that approval exhibited?

A. Well; they stamped the document and signed it by the Associate Director of the District.

Q. Will you please read the approval?

A. "Approval as to conformity with agreement between the applicant and the United States of America. G. Douglas Andrews, Associate Director Region No. 1."

Q. Now, at the time the bids were opened, will you state whether or not any representative of the Government was present?

(p. 73):

A. He was. They always have a representative present.

Q. And how about payments that are made on the estimates?

A. Well, you mean from the Government?

Q. Let me put it this way: does the Government approve your estimates?

A. For payment to the contractor, you mean?

Q. Yes.

A. Yes, they do. They bear the signature of the resident engineer inspector.

Q. Then, as I understood you this morning, that estimate is turned over to the contractor, and he gets his pay on it?

A. Yes, it is turned over to us.

Q. To you, and then to the contractor, and he gets his pay?

A. Yes.

Q. Now, on all of these jobs, will you state whether or not they were inspected by the Government—they had constant inspectors there?

A. The Government had constant inspection of the jobs, yes.

Q. And you did, too?

A. Oh, yes.

Q. On these jobs that were being constructed, was there a requirement with reference to designation of the job, so far as notices on the buildings are concerned, when they were being erected?

A. Yes.

Q. And is there a requirement in your contract with the Government that requires the applicant, and "applicant" is used with the term "owner"—synonymous with "owner"—to require the contractor to make certain reports to the Government?

Mr. Eckert:

I think the contract will speak for itself.

Mr. Margiotti:

I want to find out if he knows.

A. Yes, I think that is right.

Q. I call your attention to page 12, and I would like to have you read the provision with reference to signs on projects that are being constructed.

A. "Signs.—The applicant will cause to be erected on the site of the project at points and in positions to be designated by the Administrator's representative or agent assigned to the inspection of the project, signs in such quantity and of such dimensions as will be designated by the State Director, which signs will bear the legend P. W. A. Federal Emergency Administration of Public Works"; a blank space for the description of the project, and the project number.

Q. Was that carried out on these eighteen projects? (p. 74):

A. It was.

Q. I want you to read the provision on contract construction reports, Section 17, same page.

A. "Construction Reports.—The applicant will require that there shall be submitted to it by each construction contractor and will, in turn, submit to the Administrator's authorized representative or agent, schedules of the costs and quantities of materials and of other items, and that such schedules shall be in such form and shall be supported as to correctness by such of the estimates upon which they are based as such representative or agent may require. The applicant will also require that there shall be submitted to it by each such contractor and will, in turn, submit as above stated, the following reports on forms to be supplied by the Government: (a) Detailed Estimate, and (b) Periodical Estimates for Partial Payment."

* * * * * * * * *

JOSEPH J. MITCHELL

Direct Examination

* * * * * * * * *

(p. 81):

Q. Will you state whether or not those estimates were approved by PWA?

A. They were all approved by PWA before they were paid.

Q. Were they turned over to the contractor, and the contractor gets his pay on them?

A. Are the estimates turned over to him?

Q. Yes.

A. No. The estimates are turned over to the Controller of Allegheny County, and he pays the contractor, who receipts for the same.

Q. Who presents them to the Controller?

A. The Department of Public Works.

Mr. Eckert:

Q. Of the County?

A. Of the County, yes.

Mr. Margiotti:

Q. Will you state whether or not those estimates when they are prepared—whether they are submitted to the contractor?

A. Yes; the contractor signs them before he presents them to the Accounting Department of the Department of Public Works, and then from there they go to the County Commissioners, who also approve them for payment before they go to the Controller.

Cross Examination

(p. 83):

The Witness:

The reason I say that is because the PWA auditors—that is, the United States Government—make a separate audit every time they give us a percentage of the job. In other words, to begin with, they will make a first audit of ten per cent, and grant us ten

14a

Joseph J. Mitchell—Cross

per cent outright of the cost of the job; and then at a certain interval they will give us another fifteen per cent, and then another fifteen per cent, and—There is forty-five per cent involved, and the last ten per cent usually comes after the completion of the job, after all the estimates are paid. Now, when an estimate is paid it is shown right in the PWA audit, and, of course, we get ten per cent of that when the job is finished. In other words, any job—

. . . . . .

(p. 84):

Q. Well, if you have submitted to the PWA a cost of $100,000.00 on the whole project, you would have expected to get either $45,000.00 or $30,000.00, depending on whether it was a thirty per cent grant or forty-five per cent?

A. That is, if it cost $100,000.00, yes.

Q. If the electrical work was $10,000.00 as you estimated, you would get $4500.00, wouldn't you?

A. You mean on that one item? Just on the electrical work, you mean?

Q. You wouldn't get any particular amount for the electrical work, would you? You would get it on the whole job.

A. Well, each of it is detailed. It is detailed into electrical work, or whatever was done on the job. It is detailed for engineering—that is, preliminary expense—and contracts, and damages that are paid.

Q. But did you get forty-five per cent of all the item of the work?

A. That is right, because when it is totaled up at the end of the estimate, you get forty-five per cent of whatever it represents. So if you break it down, you would break it down forty-five per cent to each item. So it wouldn't make any difference.

. . . . . .

(p. 85):

Mr. Eckert:

Q. There is no allocation like that made by the Federal Government?

A. There is on their detailed estimates, yes. Their auditors make a detailed statement, and, of course, they put on there—as the job progresses, they give you whatever percentage they are giving at that time. In other words, it might be only ten per cent of the total amount of the electrical work done in a certain period, and the next time it will be fifteen per cent of it; but in the final analysis of it, it only amounts to forty-five per cent of the total cost. They work on a cost basis. They don't work on an estimated basis—providing your forty-five per cent is equal to the amount that they agree to furnish against that job.

* * * * * * * * * *

(p. 86):

pp. 206-209

M. M. STEEN recalled, testified as follows:

Direct Examination

(Letter marked Plaintiff's Exhibit No. 82)

Mr. Margiotti:

Q. Mr. Steen, I asked you to produce a letter of instruction from the Federal Emergency Administration of Public Works in connection with the affidavits. You have handed me Plaintiff's Exhibit 82. Is that the letter?

A. This is the letter, yes. There were letters in connection with different projects. This is in connection with the project 2017-F.

Q. Is that the first letter you received with reference to affidavits?

16a

M. M. Steen—Direct
Offer—Pltff's Ex. 82

A. There are two here—one October 28th, one on October 29th, and one November 9th—three.

Q. This is the one of October 28th?

A. That is correct.

Q. Which job does that refer to?

A. It is on 2017-F, West Liberty Elementary School.

Q. And attached to the letter were certain forms. Are these forms of the affidavit?

A. They are the forms of the affidavit that you read today.

Q. And who furnished you with those forms?

A. The Government. The PWA furnished those.

Mr. Margiotti:

We offer in evidence Plaintiff's Exhibit 82.

(Letter read to jury by Mr. Margiotti)

Q. And your instructions were similar as to Spring Garden School, Thaddeus Stevens School, and the Miller School?

A. That is correct. I think they were also on the South Vocational, but we haven't got the letter. We can't find the letter, but we have the affidavit.

Q. And the Thad. Stevens School is dated October 28, 1938, the Miller School October 29, 1938, and the Spring Garden School November 9, 1938. Is that right?

A. That is the date of those letters, yes.

Q. Were they received about that time?

A. Oh, yes. I believe they are stamped on there the date of their receipt. They may not be.

(p. 87):

Q. Now, you were to produce the minutes of the School Board showing the acceptance of the offer on the seven projects that you didn't produce minutes in. Do you have them?

A. Yes, I have.

Q. Are they included in those three books?

A. They are.

Q. Among other things, of course.

A. Yes. Do you want me to read them?

Q. I don't think so. I think I will just show them to counsel, and they may admit these are correct, and we won't have to offer them.

(Informal discussion off the record)

Mr. Margiotti:

Are you satisfied that the minutes of the Board of Public Education of Pittsburgh show that offers were made by the Government in connection with PWA grants on the seven projects, copies of which minutes were not received this morning, and that the offers were accepted by the School Board, the offer and acceptance being similar to the ones that are already in evidence?

Q. Is that right, Mr. Steen?

A. That is correct, yes.

HARRY HIVELY

Direct Examination

(p. 100):

Q. May I ask one question before we produce these: Are the PWA funds which were received on these various projects so earmarked by the City, or are they kept in a separate account, or what?

A. They are kept in a separate account.

Q. And earmarked as such. Is that right?

A. That is right.

Q. I just happened to notice in all these you have "PWA".

18a

Harry Hively—Direct

(Short recess taken at this point).

Mr. Eckert:

If Your Honor please, to clear up what Mr. Margiotti asked the witness just before the recess, I would like to ask a couple of questions on that ground.

Mr. Margiotti:

Well, Mr. Eckert, I am not through on that. I am not through with the witness in chief, and I am going along on that question. Of course, it is up to the Court, whatever the Court suggests, but I would like to go on myself.

Mr. Eckert:

There were a couple of questions on these accounts; in other words, I think they are misleading, and I would like to have him clear it up.

(p. 101):

The Court:

We will let you do that.

Mr. Eckert:

Q. Mr. Hively, will you tell us from what fund these vouchers that you have produced here for the projects in question are actually paid?

A. This (indicating) is North Side Market, I don't know what exhibit number—

Q. I am not referring to that project alone, I mean all these projects.

A. Well, this particular North Side Market, we paid from two funds. That was the first grant we ever got from the Government, and we put their money in one bank account and put ours in the other, and we paid out of that from the Government and the City.

Q. And on the other projects, how did you handle them?

A. They were all paid out of the bond fund; originally they were all paid out of the bond fund.

Q. Your vouchers were paid out of a City account in which it puts the proceeds of bond issues?

A. Yes, sir.

Q. And then would you put the funds from the PWA into that bond account to reimburse it later?

A. Yes, sir.

Q. On this North Side Market job I see you have "bond fund" marked on your slip.

Mr. Margiotti:

Are you through, Mr. Eckert?

Mr. Eckert:

Yes.

Mr. Margiotti:

Q. Mr. Hively, your contract with the Government has this provision: "5. Construction Account. A separate account or accounts, herein collectively referred to as the Construction Account, will be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation. The advance grant payment, the intermediate grant payments, the proceeds from the sale of the bonds, exclusive of accrued interest, applicant's funds, the final grant payment, and any other money which shall be required in addition to the foregoing to pay the cost of constructing the project, will be deposited in the Construction Account promptly upon receipt thereof. All accrued interest paid by the Government at the time of the delivery of any bonds will be paid into a separate account, herein referred to as the Bond Fund. Payments for the construction of the project will be made only from the Construction Account." That is a part of the provision of your contract. I will let you see it (handing paper to witness),—maybe you are not familiar with this.

A. We followed that.

Q. You followed that provision?

A. Yes.

20a

Harry Hively—Direct

(p. 102):

Mr. Eckert:

If the Court please, I move to strike that out, as a conclusion on the part of this witness. He has stated the specific facts, that in all cases except the North Side Market they paid the vouchers out of the bond account and later reimbursed that out of funds received from the PWA. In the case of the North Side Market they deposited their funds in two different accounts and paid checks out of those two different accounts, that is, some checks out of the one account and some out of the other. Those are the specific facts.

Mr. Margiotti:

Well, I object to the witness's answer being stricken out. I am going further with the witness on that question, and perhaps you might withhold your request until I am through.

Mr. Eckert:

We move to strike out the answer, as a conclusion on the part of the witness. The specific facts are all that are evidentiary.

The Court:

It looks to me as though that is a fact answer. The better practice would have been to ask him to describe how the payments were accomplished.

Mr. Margiotti:

All right, Your Honor; I will ask him that question.

Q. Do you have—do you maintain a construction account?

A. Yes, sir.

Mr. Eckert:

Pardon me. Did the Court rule on our motion?

The Court:

I decline to strike.

Q. Do you maintain a construction account?

A. Yes, sir.

Q. And what goes into the construction account?

A. The proceeds from the bonds that we sold and the Government money that they turned over to us.

Q. In selling bonds, did you sell bonds for the entire cost of a project, or for fifty-five per cent of it?

Mr. Strassburger:

If he knows.

Q. (Continuing) Of course. Don't answer, if you don't know; just say, "I don't know".

A. We sold bonds in the amount of eight million dollars, which we say was our fifty-five per cent; and then we called on the Government as the work progressed to get their forty-five per cent in.

Q. I see. So that this fund consisted then of money you got from the sale of bonds and the money you got from the Government. Your bond money was fifty-five per cent, and the Government's money was forty-five?

A. We didn't get the forty-five per cent yet; we were getting it gradually.

(p. 103):

Q. As you got it, anyhow, it went into that fund?

A. Yes.

Q. And these payments were made out of that fund?

A. Yes, sir, out of the bond fund.

Q. You call that the bond fund?

A. The bond fund construction account.

Q. Were there any other payments made out of this fund, the bond fund or construction account, as you call it, except for PWA projects?

A. No.

Q. Was there a bank used in connection with this account, or was it maintained by the City? Was there a bank used?

22a

Harry Hively—Direct

A. We put the Government money in one bank and put our money in another bank.

Q. And did you do that in all those cases?

A. All these cases.

Q. So that you kept the Government's money separate and apart even from the bond money?

A. We drew the warrants or checks on the bond fund.

Q. Yes?

A. Then we would apportion the certain amount that should be paid out of the Government fund and wrote out a check and got the money out of the Government fund and transferred it back into our fund for their share.

Q. But you kept the Government's money—

A. Separate.

Q. (Continuing) —separate and apart from your own funds?

A. Up until the time we started to spend it.

Q. And then when you had to spend it, you spent it as you were required to under the conditions laid down by the PWA?

Mr. Eckert:

Objected to, as calling for a conclusion and leading.

Mr. Margiotti:

All right. I withdraw it; I think it is both.

Q. When would you draw out of the Federal account?

A. Every fifteen days.

Q. And what would you draw?

A. We would draw a check on the Government money. (p. 104):

Q. For what?

A. For part of these costs that had been going on, that we had originally paid from our fund.

Q. Were those payments approved before they were made?

A. Yes, sir.

Q. By whom?

A. By the Government, by the Department of Public Works, by the Controller.

* * * * * * * *

Mr. Margiotti:

Q. Will you state whether or not you were permitted to withdraw the money that you had in a separate account in which you kept the Federal aid money—call it that—without the approval of the Government in some form?

A. We drew it out first without their approval, but they would come along later and audit it and see if it was all right, and if it wasn't we would have to make a return. They haven't objected to anything yet.

Q. In other words, you have all been honest and accurate. Now, what do you have before you?

A. Original vouchers of the City Controller's Office.

Q. Which one of these bundles would be a fair example of the others? Pick one out that I can look at, that you would like to have me look at to give me a general view of the situation.

A. (Witness hands bundle of papers to counsel).

Q. Does that bundle refer to a particular project?

A. No.

Q. Do you have more than one project in a bundle?

A. Yes.

Q. Well, do they all refer to the projects mentioned in the complaint?

Mr. Eckert:

If he knows.

Q. (Continuing) If you know. (Handing copy of complaint to witness). These that are marked "C", just

look at these—the contracts followed by the letter "C" are the ones we have in mind.

(p. 105):

The Court:

Couldn't the matter be accomplished by asking him if this was the practice followed on all projects that the Government was interested in?

Mr. Margiotti:

The Court has made a very good suggestion.

Q. Is this the practice that was followed on all PWA work?

A. Yes, sir.

. . . . . .

(p. 106):

Q. Now comes the Federal Works Agency estimate, and I note that this is dated June 10, 1940, about fifteen days before the City estimate. Do you notice that? Is that correct?

. . . . . .

Q. Will you look at that, please? Will you state whether that is the PWA form?

. . . . . .

Q. (Continuing) Well, whose form is it? This (indicating in said papers) you said was the City's form. Is that correct?

A. That is right.

Q. And whose form is this, the yellow sheet?

A. That is the forms that the Government gave us to fill out, and they check it over too, and sign it and approve it.

. . . . . .

Cross Examination

(p. 109):

Q. In making the transfers from the account in which you first deposited the PWA money to your bond account, I believe you testified that you did that without first getting approval of the PWA. Is that right?

A. We got approval—Before we started this we had a conference between the Controller's Office and everyone concerned, and they wanted us to put our money in a special bank account, and we told them we couldn't do it, we would work it out some other way, and we worked it out with this system, and the Government approved it.

(p. 110):

Q. Then you would transfer funds from the account in which you first placed the PWA money to your bond account, to reimburse your bond account for the amount you had paid the contractors, without getting any specific approval for those transfers before you made them. Isn't that right? Before you would make a transfer—in other words, before you drew a check on the account in which you first deposited the PWA funds and deposited that check to the credit of your bond account, would you get the approval of any PWA official?

A. Yes, there would be an ordinance go through Council authorizing us to transfer that money.

Q. An ordinance of the City Council?

A. Yes.

Q. But I say, did you get any approval from any Federal Government man?

A. We did it; they didn't disapprove of it, so they must have approved it.

Q. Well, as far as you know, was any specific approval obtained first before you made such a transfer, from the Federal Government?

A. I couldn't answer that question.

Q. Not as far as you know?

A. No.

Mr. Margiotti:

Wait a minute. He said he couldn't answer that question; that was the answer.

Q. Well, as far as you know, was any specific approval obtained from any PWA official?

A. I think there was.

Q. Was that in writing?

A. I don't know.

Q. Well, do you have any knowledge on the subject?

A. Not to answer the questions that you are—

Q. Pardon me?

A. Not to answer the questions that you are throwing at me that way. I would rather go back to the office and check them and answer the question later.

Q. You don't know?

A. Not positively.

Q. Didn't you testify on direct examination that every fifteen days or so you would draw a check on the account in which you first placed the PWA funds, and deposited that to the credit of your bond account, without getting the approval of the PWA in advance, and then later PWA would come around and audit your books, but they have never found anything wrong yet?

(p. 111):

A. Yes, they approved them, but I don't know whether we had the authority to go ahead and do it and then come around and check it later; I don't know whether we had that authority first.

. . . . . .

M. M. STEEN

Direct Examination

(p. 114):

Q. Mr. Steen, I read to you from Form 230, being part of the contract between the Government and the School Board, reading as follows: "Construction Account.—A separate account or accounts, herein collectively referred to as the construction account, will be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation. The advance grant payment, the intermediate grant payments, the proceeds from the sale of the bonds, exclusive of accrued interest—applicant's bonds—the final grant payment, and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the project will be deposited in the construction account promptly upon receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds will be paid into a separate account herein referred to as the bond fund. Payments for the construction of the project will be made only from the construction account." I call this provision to your attention, and now ask, what did the School Board do with reference to that provision? Exactly what did you do upon receipt of funds? How were they kept, and how were they paid out?

A. We had the construction account, PWA construction account, which is known in these various papers at different places as Item 15, and into that was placed the funds as you have read—the bonds that were sold for this purpose, the various payments made by the PWA at intervals as required by the contract, and any other funds that would be applicable to this particular work. The contracts were set up for each particular project as separate bank accounts for these eighteen separate contracts under Item 15, PWA construction account, and were paid out of

that account as the certificates for payment, duly attested by the proper authorities, were received by the Board and were then honored by payment.

Q. When you say, "duly attested by the proper authorities" –attested by whom?

A. Well, these certificates for payment were signed by the resident engineer inspector for PWA, I signed them, and I don't know who the other signatures on there were. I would have to look at the contract to see.

Q. The contract would show?

A. Yes.

. . . . . .

(p. 115):

Mr. Margiotti:

Q. Then, Mr. Steen, when you set up the separate bank account for each project, generally speaking, what share was paid by the Government and what was paid by the School Board?

A. Well, generally speaking, forty-five per cent was paid by the Government, and fifty-five per cent was paid by the School Board.

Q. And paid out of that particular fund then for the entire project?

A. That is correct.

Cross Examination

Mr. Eckert:

. . . . . .

Q. And then, for your own accounting purposes, you would designate that with some number. Is that it?

A. Yes. It all came under Item 15, PWA construction account, and the moneys in there had to be certified to the Government that they covered the fifty-five per cent

that we were obligated for. They had to be certified to by the bank officials.

~~(p. 116).~~

Q. But the School Board, could, if they had wanted to, pay the contractor even though the PWA inspector had not concurred in that particular payment?

A. I think they could.

Redirect Examination

Mr. Margiotti:

Q. If they did, would that be on their own responsibility?

A. I think it would.

Q. Mr. Steen, you said in answer to Mr. Eckert's question that the School District could pay estimates if they wanted to, but it would jeopardize their participation in the grant. What did you mean by that?

A. I said I thought they could, I thought the School Board could pay out on an estimate that they approved whether it was signed by the PWA inspector or not; but I thought if they did so, they would jeopardize the amount of forty-five per cent of that estimate that the PWA did not approve. You understand, I said I thought they could do that.

* * * * * * * * * *

Q. You also think, since you are thinking, that it would be on their own responsibility?

A. I certainly think so, yes.

* * * * * * * * * *

Q. Now, did the Government require you, in making up this account, construction account, referred to in the contract—did the Government require you to deposit any particular amount of a job before they gave you forty-five per cent?

30a

Harry Hively—Direct

A. The Government required that we deposit our fifty-five per cent.

Q. First?

A. Yes. We had to deposit that and have the bank certify to the fact that much was on deposit. As a matter of fact, if the funds—due to extras accumulating on the job, the amount we originally deposited would not insure completion—it fell short because of the extras coming in—they notified us. We would have to put an additional sum in to cover our participation.

Q. Before the Government would give you your forty-five per cent?

A. It wasn't so much a question of what they would give us. They notified us as soon as we began to run short. They had notice of all the payments made.

(p. 118):

Q. Did the Government, through PWA, exercise any supervision such as inspection or audit of bank deposits?

A. They did, yes. They audited all the accounts. Prior to the granting of the ten per cent, the ten per cent before completion, and the granting of additional ten per cent on final completion of the project, the books were audited, and they did not make the payments until the audit had indicated to their satisfaction that the accounts were correct.

. . . . . .

HARRY HIVELY

Direct Examination

. . . . . .

(p. 120):

Mr. Margiotti:

Q. Mr. Hively, that account in which you deposited the PWA money was called what?

A. Construction account of the different projects, I think.

Q. And how would you determine when to withdraw from the construction account and place it in the bond account?

A. Every fifteen days. As these estimates came through, and we paid the whole hundred per cent out of our money, then we wanted forty-five per cent back off of them.

Q. On each estimate paid, you would pay fifty-five per cent and you would get forty-five per cent from the construction account, put it in your account, and pay out the one hundred per cent. Is that right?

A. Yes.

Mr. Eckert:

He didn't say that. He said they would pay the contractor first one hundred per cent out of the bond account, and after that they would reimburse the bond account from what you call the construction account.

(p. 121):

Mr. Eckert:

Q. Isn't that right, Mr. Hively?

A. Yes.

Mr. Margiotti:

Q. When was that done?

A. Every fifteen days.

Q. All right. Now, today is pay day, we will say, and there is $10,000.00 due the contractor on an estimate. What would you do today?

A. Pay him out of our bond fund.

Q. What would you do with the construction fund?

A. Wait until the end of the fifteen days—our bond fund has a construction account, too. It is marked "Construction".

32a

Harry Hively—Direct

Q. You have a bond account, which is the City money, and the construction account was the PWA money. Today, for instance, is the fifteenth day of the month, and today an estimate must be paid to a contractor who has $10,000.00 coming to him, in round figures. Now, what would the mechanics be? How would you pay him?

A. Pay him out of our bond fund.

Q. You would give him a check for $10,000.00?

A. Yes.

• • • • • • • • •

Mr. Margiotti:

Q. What would you do with the construction account?

A. At the end of the next fifteen days, we would go over to the Treasurer's office with a list of these warrants and draw on the PWA construction account, and transfer the money back into our fund.

Q. You mean, then, that the $4500.00 that was due from the construction account would not be withdrawn from the construction account—

A. It was at the end of every fifteen days.

Q. Would it not be withdrawn at the same time the warrant was paid?

A. No, sir.

(p. 121):

Q. It would be withdrawn fifteen days later?

A. Yes, sir. The Government did want us every day to do that, but it was too much bookkeeping, and then we agreed the fifteenth and the thirtieth would be all right.

Q. That was by agreement of the Government and the City?

A. Yes. Instead of writing two checks every month, you might have three or four hundred. Just the simplest method of bookkeeping.

• • • • • • • • •

Mr. Eckert:

Q. That is true of all Government money—the City's as well as any other Government money?

A. It was all fully protected. Although it was the Government money, it was in our name and we protected it, to see it was taken care of.

PAUL HUGHES

Direct Examination

(p. 141):

Q. State how you handled your bank transactions with reference to the construction of this school.

A. We set up a separate bank account for this job only, under instructions from PWA to do so, and the officers of the Board were given authority to pay contractors upon approval of the work by the architect and approval by the PWA inspector.

Q. And what funds did you place in that account?

A. We placed in the fund the amount of approximately $7,000 from the Board's current funds, the forty-five per cent as we received it from the Government, and the balance was a small bond issue which we floated.

Q. In other words, then, you put your fifty-five per cent and the Government's forty-five per cent in the same fund, and you paid for the entire job out of that fund?

A. That is right.

Q. I assume, after obtaining approval, the School Board did the paying?

A. Yes.

34a

Walter R. Dripps—Cross
Alfonse R. Ferrucci—Direct

WALTER R. DRIPPS

Cross Examination

• • • • • • • •

(p. 156):

Q. These periodical estimates for partial payment, as well as the estimate for final payment, were presented to you and were the basis on which you wrote the checks, the checks that were given to the contractor in payment for his work. Is that right?

(p. 157):

A. Yes, sir.

Q. I am referring to the periodical estimates for partial payment and the final estimate which comprise a part of Exhibit 130.

A. That is right.

• • • • • • • •

(p. 159):

ALFONSE R. FERRUCCI recalled, testified as follows:

Direct Examination

Mr. Margiotti:

• • • • • • • •

Q. Mr. Ferrucci, I have asked you to produce the I-23 forms, which are the partial and final payments on the projects involved in this law suit so far as the City is concerned. Will you produce them now?

A. (Witness produces papers, which were thereupon marked Plaintiff's Exhibit No. 137.)

Q. You have produced Plaintiff's Exhibit 137. Will you state whether this exhibit contains the Castman contract—I will refer to them collectively.

A. Yes.

• • • • • • • •

(p. 160):

Q. Now, Mr. Ferrucci, do you know whether or not, in connection with each of these projects, the contractor furnished weekly payroll sheets such as Plaintiff's Exhibit 131?

A. No; I don't handle that.

Q. Who handles them?

A. That is in the contract department.

Q. And change sheets such as Plaintiff's Exhibit 132?

A. These come in to my office after they have been approved by the Public Works Administration.

Q. And if there were any changes in any of these projects, would the changes come through on this form?

A. Yes, sir.

. . . . . .

WALTER D. FERREE

. . . . . .

(p. 173):

Redirect Examination

Mr. Margiotti:

Q. Mr. Ferree, the inspector—you made two statements with reference to the PWA representative on the job. In one instance you said "resident engineer" of the PWA, and the other the "inspector". Did you intend that to be one and the same person?

A. I did. That was his correct title—resident engineer.

Q. Was there more than one on the job?

A. Yes.

Q. How many did they have?

A. Well, at different times they changed engineers, I think there were three.

36a

William C. Evans—Direct

Q. Were there three there at one time or only one at a time?

A. Only one.

Q. Any other PWA employees there?

A. No, other than their auditors.

Q. What did the auditors do?

A. Came in and audited our accounts periodically.

Q. What accounts?

A. Checked over our accounts in regard to payments, the estimated amount of the completion of the project, and so forth.

Q. Will you state whether or not they audited your bank account set up for this particular project?

A. Yes, sir.

. . . . . .

WILLIAM C. EVANS

Direct Examination

. . . . . .

(p. 176):

Q. Were there any changes made in the electrical contract?

A. Yes, there was some change—some credits and some debits.

Q. Did those changes go through on Form PWA 84?

A. That is the form that was returned from Harrisburg on every change order. We submitted a sheet approved by the architect, and offered a Resolution and sent it to Harrisburg for approval, and it came back approved on that sheet from Harrisburg.

Q. You sent in your requisition, as it were?

A. We sent in a Resolution.

Q. Requesting a change, and they considered it?

(p. 177):

A. Sometimes they sent it back and approved it for a certain amount or deleted it for a certain amount, if they thought we were being over-charged, and they said they would participate in the grant for a certain percentage.

Q. That usually applied to a change in conditions?

. . . . . .

(p. 183):

Q. Mr. Evans, were your accounts audited by PWA?

A. They audited three different times.

Q. Will you state whether the project was supervised?

Mr. Eckert:

Objected to as calling for a conclusion, and as being leading.

Q. Were there any supervisors? Were there any PWA men around the job? If there were, just name them and tell what they were doing.

A. We had a Mr. Cole and a Mr. Flood, and I just can't recall the other gentleman's name who was there finally; but the docket was under a PWA supervisor, and he had one job only—to see that the building was built according to specifications.

Q. Did you have inspectors there, too?

A. We had one inspector that was hired by the Board, and, of course, the architects.

Q. What were the designations of these men who represented PWA on the job?

A. What was the designation?

Q. Was it inspectors, engineers, resident engineers, or what?

A. I don't know whether they were called PWA inspectors or resident engineers, but Mr. Cole was the first one, and then came Mr. Flood, and I can't recall the other

man. I have a mental picture of him, but I can't recall his name—a tall boy, with glasses on, heavy set. If I would hear his name, I would know it.

• • • • • • • •

(p. 184):

Q. Is there any provision in your contract with the Government, and if there is please advise me where it is, that would refer to the nature of the control on inspection, whether it is joint or one is superior to the other?

A. It is my opinion that we were building the building—

• • • • • • • • •

A. (Continued) I don't recall. There may be, but I don't know specifically.

• • • • • • • • •

Cross Examination

Mr. Eckert:

Q. Mr. Evans, the School Board hired some architects. Is that right?

A. Hired an architect.

Q. And the architect prepared the plans for the school. Is that right?

A. Yes.

Q. And the architect then supervised the construction of the school in accordance with the plans and specifications which he had prepared for the School Board?

A. After the approval of the Department of Public Instruction, and the Art Commission, and the Department of Labor and Industry, and the PWA approved them, they started on the job.

Q. After the plans and specifications had been approved by those various bodies?

A. That is right.

(p. 185):

Q. And then the PWA also had an inspector?

A. That is correct.

Q. And he saw, also, that the work was progressing in accordance with the contract. Is that right?

A. That is right.

(p. 186):

Q. In whose name was this bank account that you referred to?

A. The School District has a number of funds. We have a general fund, a bond account, a coupon account, and a construction account, and a sinking fund. This was the construction fund of the School District of the Borough of Braddock.

Q. Just how would you get the funds from the PWA? Would they come in the form of a check to the order of the School District of the Borough of Braddock?

A. That is right. I don't know just exactly, but they were paid to the Treasurer of the School District of the Borough of Braddock. He deposited it in the account.

Q. The Treasurer of your School Board would deposit that check in this account in the name of the School District, with the suffix "Construction Account". Is that right?

(p. 187):

Mr. Eckert:

Q. Would there be a resolution of the School Board passed directing the payment of the several amounts that the electrical contractor received in payment for his work?

A. They are paid on the presentation of the I-23's, which were signed by the architect and the resident engineer of the PWA.

. . . . . .

(p. 194):

Q. What is Form 290, Exhibit 153?

A. That is the final form which comes from the Government.

Q. Does this form cover the project cost and grant claimed, and the portion grant cost, and payment, and the complete final figures?

A. Yes, sir.

Q. Just how much was received and how much the School District put in—received from the Government, what the School District's share was, and how the money was spent?

Mr. Eckert:

If the Court please, I object to this, as calling for a conclusion and not the best evidence.

Mr. Margiotti:

It is only for the purpose of describing the paper, that is all.

A. That is the financial statement from the Government.

Q. And what is the purpose of obtaining Plaintiffs' Exhibit 153?

A. Why I brought it along?

Q. I say, what is the purpose of the Government furnishing such a statement?

Mr. Eckert:

If you know.

Q. (Continuing) If you know, of course.

A. I brought that along to answer questions. This gentleman (indicating Mr. Eckert) asked me how much

we had put in and how much the Government contributed, and that is all on this final sheet.

Q. I understand that; but how does it happen the Government furnishes this statement?

A. They give you a new sheet every time they give you a grant payment, every time they make a partial payment they send you a Sheet 290.

(p. 195):

Q. And in the end they send you a final figure?

A. Final figure.

Q. And this Plaintiffs' Exhibit 153 is the final figure?

A. A final figure.

Cross Examination

(p. 196):

Mr. Margiotti:

Q. And when the money comes in it is not allocated to any particular part of the project, but the whole project; but they break it down. And the electrical project is a part of the whole?

A. It is listed under the construction; it is part of the construction contracts.

Mr. Eckert:

Q. That is, in arriving at the total estimated cost of the project for the purpose of determining the amount of the PWA grant. Is that right?

A. The mechanical contracts and the general construction are all listed under construction on the breakdown sheet.

Q. That is when you are estimating the total cost, in applying for your grant in the first place. Isn't that right?

A. Yes, sir.

42a

Walter R. Dripps—Cross

Q. And then the Government makes a lump sum grant and pays you installments, as you have said, from time to time on account of that lump sum grant. Is that right?

A. As the work progressed to a certain percentage.

(p. 197):

Mr. Margiotti:

Q. But as the payment is made they approve the payment, and you set forth the part that goes to the electrical contractors and the amount that goes to the other contractors, don't you?

A. What is that?

Q. Before payment is made on these final estimates, the Government approves that payment for a particular purpose—

Mr. Eckert:

Wait a minute. I object to that, as leading and not the best evidence. We have the periodical estimates for partial payment, which speak for themselves as far as that is concerned.

The Court:

The estimates would speak for themselves, as far as that is concerned.

A. You pay on the I-23's for each contractor.

Mr. Eckert:

Q. And when you say you pay, you mean the School District of the Borough of Braddock?

A. That is correct.

* * * * * * * *

WALTER R. DRIPPS

Cross Examination

* * * * * * * *

(p. 212):

Q. How often would the PWA inspector be there?

A. Every day.

Q. How long each day?

A. I would say on an average of about an hour a day, some days a little longer, some days not quite so long.

Q. Did he also have some other jobs under his inspection, do you know?

A. I understand that he had.

Q. Do you recall just who it was at the bank that put that "P. W. A." on the pass book (Exhibit 160)?

A. If I remember right, it was Mr. Herron, the assistant manager of the bank.

(p. 213):

Q. That wasn't put on there at the time when the account was opened up, was it?

A. No, that was put on later; it wasn't put on there at the time the account was opened, no, sir. That was put on there for the Borough's benefit and the bank's benefit, as an identification of funds when checks came in.

Q. All that was written on the pass book as its title was "Borough Blawnox Improvemnt Account No. 3"?

A. At the time the book was made up, yes, sir; and the first deposit was made in there. And later the "P. W. A." was put on there so as to keep the funds straight. We had a little trouble from getting funds mixed up.

JOHN C. DEAL

(pp. 224, 225):

Redirect Examination

Mr. Margiotti:

Q. Mr. Deal, if there were to be any changes made in the contract or the plans, the Council took action on that, you say?

A. That is right.

Q. And then were those changes submitted to PWA?

A. The architect would submit them to PWA.

Q. What for?

A. For approval.

Q. And if they were not approved, what happened? What happened if they were approved or if they were not approved?

A. Well, if they were approved, they would be paid with part of the Government money; and if they weren't, we had to pay for them ourselves.

Q. In other words, if you wanted to do some work and they didn't approve, you could do it and it would be your own responsibility?

A. That is right.

Q. But if they approved it, they bore forty-five per cent?

A. They may.

Q. Well, on approval that would be the understanding?

A. Not always. Sometimes they would approve it with the understanding we would pay for it, unless it finally ironed out in the end.

Q. But, generally speaking, on some understanding between yourselves and the Government?

A. That is right.

* * * * * * * *

WILLIAM A. ENGLAND

* * * * * * * *

(p. 233):

Cross Examination

Mr. Eckert:

Q. Who wrote the checks to pay the contractor?

A. I did.

Q. And did you do that upon presentment to you of those periodical estimates for partial and final payment?

A. After they were properly approved, and also approved by Borough Council, then a voucher was drawn in payment for work done.

(p. 238):

Redirect Examination

Mr. Margiotti:

Q. Now, Mr. England, in obtaining Government grant for this construction, who made the initial move? Was the initial move made by the Borough or by the Government?

A. The initial move was made by the Borough, through its Committee.

Q. In other words, you first decided to put up this building?

A. That is right.

Q. Then you made a request of PWA for a grant?

A. That is right.

Q. And upon that request came the offer?

A. That is right.

Q. And that was followed by the acceptance?

A. That is correct.

Q. By the way, did the inspector, the resident engineer or resident inspector of PWA, have a room or quarters on the job?

A. There was a room, or part of a room, prepared for him, but he never used it.

Q. The documents and the plans, specifications and plans—will you state whether or not they were forwarded to Harrisburg to the Regional Office of PWA?

A. They were.

46a

William A. England—Recross

Q. Was that done before they were given to the prospective bidders or after the bids had been received? (p. 239):

A. Copies of the plans were taken to Harrisburg by the Committee and the architect, approved tentatively by Harrisburg—I mean PWA officials—and then, when everything was signed, all the documents were mailed to Harrisburg.

Q. In other words, then, you had the approval of your plans and specifications before you submitted them to bidders?

A. That is correct.

Q. Then after you got the contract, awarded the contract, you forwarded it to Harrisburg for approval?

A. We did.

Mr. Eckert:

If the Court please, I move the answers of the witness with respect to what the PWA did be stricken out as not the best evidence. I take it that was in writing, and the writing would be the best evidence of what the PWA actually did.

The Court:

That would be true. The motion is granted.

* * * * * * *

Recross Examination

* * * * * * * *

(p. 244):

Mr. Margiotti:

Q. Mr. England, was there any money paid by the Government before the contract with the defendant was signed?

A. Well, I am not sure about that. You see, they paid

in so much percentage—fifteen per cent, then ten per cent, then ten per cent more, and ten more.

Q. I understand that, but wasn't that all after the contract was signed?

A. I couldn't say.

Q. The contract provides how the Government is to pay?

A. Yes, it did.

MRS. LENA Z. KENNEY

Direct Examination

(p. 153):

Q. How were payments made to contractors by your School Board, Mrs. Kenney?

A. The architect's order and the PWA, and then brought before the School Board and paid on motion.

Cross Examination

(p. 255):

Q. Was the PWA inspector there all the time or not?

A. He was there frequently, but I don't know how often he was there.

Q. Well, was he there constantly?

A. No.

Q. He would be there off and on?

A. Off and on.

EARL D. COVELL

Direct Examination

. . . . . .

(p. 472):

Q. Will you state what was the practice with reference to payment of the contractor for the work that he did?

A. The practice that was followed in—I believe I am safe in saying the majority of the cases—near the end of the month the contractor, the owner's representative and the Government representative would go over the job together and agree on how much work was done during that month and make a pencil memorandum, agree in advance on what would be put on the I-23, the monthly estimate, so called. The contractor would then go back to his office and prepare this I-23 for submission to the owner. Having prearranged the amount and the amount of work, the owner would approve it, turn it over to the Government representative for his approval. He may or may not approve the full amount. If he does not approve the full amount, he writes a non-compliance list at the bottom, which are the exceptions in his approval, and he states if the owner pays in excess of a certain figure he does so at his own risk, and signs his name to that approval and to the list of non-compliance.

Q. When does the contractor get his money?

. . . . . .

(p. 473):

A. In the contract the owner obligates himself to pay the 15th of the following month.

Q. But is the contractor paid after the I-23 is approved by the representative of the PWA?

A. After the resident engineer inspector approves it, he turns it over to the owner's representative for payment.

Cross Examination (Resumed)

Mr. Eckert:

Q. The I-23's, then, as I understand it from your testimony, are made up by the contractor in accordance with this pencil memorandum that you refer to?

A. That is the preferred procedure, yes, sir. In many cases there was no pencil memorandum; he would make it up, what he thought ought to be due him, and submit it for approval.

Q. But the other was the practice in you said eighty per cent of the cases?

A. I should say so, on the better jobs, eighty per cent of the cases.

United States of America
Eastern District of Pennsylvania } *Sct.*
Third Judicial Circuit

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original Appellees' Appendix, filed April 22, 1942, after the decision of the Court, containing additional portions of the original transcript of record not included in the Appellants' Appendix in the case of

United States of America, ex rel. Morris L. Marcus and Morris L. Marcus in His Own Behalf vs. William F. Hess et al., Appellants, (No. 7841),

on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 24th day of April in the year of our Lord one thousand nine hundred and forty-two and of the Independence of the United States the one hundred and sixty-sixth.

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

(Seal)

[fol. 545] [Stamp:] Office of the Clerk, Jun. 17, 1942, Supreme Court, U. S.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. —

UNITED STATES OF AMERICA, ex rel., MORRIS L. MARCUS, and Morris L. Marcus in His Own Behalf, Petitioners,

v.

WILLIAM F. HESS, et al.

Stipulation

Subject to This Court's Approval, It Is Hereby Stipulated and Agreed, by and between the attorneys for the respective parties hereto, that for the purpose of the Petition for a Writ of Certiorari, the printed record may consist of the following:

1. Appendices to the Respondents' briefs in the United States Circuit Court of Appeals for the Third Circuit.

2. Appendix to the Petitioners' brief in the United States Circuit Court of Appeals for the Third Circuit.

3. The proceedings had before the United States Circuit Court of Appeals for the Third Circuit and the Opinion of that Court.

Charles Margott, Attorney for Petitioners.

Dated this 15th day of June, 1942.

William H. Eckert, Eugene B. Strassburger (s), Attorneys for Respondents.

Dated this 13th day of June, 1942.

[fol. 546] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 173

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 547] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 173

STIPULATION—Filed November 10, 1942

Subject To This Court's Approval, It Is Hereby Stipulated And Agreed, by and between the respective parties hereto, that for the purpose of consideration of the above entitled case upon Writ of Certiorari, the printed record shall consist of the papers which, by stipulation, constituted the printed record on Petition for Certiorari.

It Is Further Stipulated And Agreed that either of the parties hereto may refer in his brief to the record on appeal in the Circuit Court of Appeals for the Third Circuit as certified by the Clerk of that Court and filed in the Supreme Court of the United States.

Homer Cummings, Attorney for Petitioners.
Dated this 7th day of November, 1942.

William H. Eckert, Eugene S. Marbury, Attorneys for Respondents.
Dated this 6th day of November, 1942.



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No. 173

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, EX REL. MORRIS L. MARCUS, AND MORRIS L. MARCUS IN HIS OWN BEHALF,

Petitioners,

v.

WILLIAM F. HESS ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

HOMER CUMMINGS,
CHARLES J. MARGIOTTI,
Counsel for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

UNITED STATES OF AMERICA, EX REL. MORRIS L. MARCUS, AND MORRIS L. MARCUS IN HIS OWN BEHALF,

Petitioners,

v.

WILLIAM F. HESS ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Your petitioners, the United States of America ex rel. Morris L. Marcus and Morris L. Marcus in his own behalf, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in the above cause on March 23, 1942, reversing the judgment of the United States District Court for the Western District of Pennsylvania.

Opinions Below.

The opinion of the district court denying motions for new trial and judgment n.o.v. (R. 346) is reported in 41 F. Supp. 197. The opinion of the circuit court of appeals (R. 471) is reported in 127 F. 2d 233.

Jurisdiction.

The judgment of the circuit court of appeals sought to be reviewed was entered on March 23, 1942 (R. 485). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

Respondents, through admittedly collusive bidding, secured contracts to perform work on municipally sponsored PWA projects. Their contracts, work, and claims were supervised and approved by Federal officers. They were paid, through the municipalities, with funds obtained from the Public Works Administration. The broad question here is whether respondents are liable to the United States for double damages and penalties on account of their fraud, under one or more of the first three clauses of R. S., sec. 5438. A question is therefore presented under each clause as follows:

1. *Liability under first clause of statute.*—Whether, in a suit on behalf of the United States for damages and penalties, an admittedly fraudulent contractor's claim approved by a Federal officer and paid out of United States (PWA) funds is not actionable under the first clause of R. S., sec. 5438, as a "claim upon or against the Government of the United States, or any department or officer thereof"?

2. *Liability under second clause.*—Whether the making and presentation by a defendant contractor of fraudulent

claims and false certificates of non-collusive bidding, used by a municipality to aid it in obtaining payment of a grant to such municipality of United States (PWA) funds for the purpose of paying such contractor's claims, is not actionable as against such contractor under the second clause of R. S., sec. 5438, which imposes liability upon "every person • • • who • • • makes, uses, or causes to be • • • used, any false • • • claim [or] certificate" for the purpose "of obtaining or aiding to obtain the payment or approval of" a claim against the United States?

3. *Liability under third clause.*—Whether the presentation of fraudulent contractors' claims addressed to the municipal sponsor of a PWA project for payment from federal PWA funds in the hands of such sponsor—all in furtherance of a conspiracy to defraud the United States—is not actionable under the third clause of R. S., 5438, which imposes liability upon any person who enters into "any agreement, combination, or conspiracy to defraud the Government of the United States" by obtaining the allowance of "any claim," whether against the United States or against a third party, where the effect is to defraud the United States.

Statutes Involved.

Revised Statutes, sec. 5438:

> Every person [1] who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll,

account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars.

Revised Statutes, sec. 3490:

> Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.[1]

Revised Statutes, sec. 3491 and 3493, authorizing *qui tam* proceedings to enforce the liability imposed by R. S., sec. 3490, are printed in the Appendix.

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[1] Because R. S., sec. 3490, imposed the liability enforceable in *qui tam* proceedings under R. S., sec. 3491, only for acts in violation of the prohibitions contained in R. S., sec. 5438, at the time of the enactment of R. S., sec. 3490, and its incorporation of R. S., sec. 5438, in 1874, the conduct and acts giving rise to a cause of action under R. S., sec. 3490, must be measured by the language of R. S., sec. 5438, as it originally read at the date of the enactment of R. S., sec. 3490, and not as later amended. *Olson* v. *Mellon*, 4 F. Supp. 947, aff'd 71 F. 2d 1021, cert. denied 293 U. S. 615.

While R. S., sec. 5438, was later amended (see 18 U. S. C. secs. 80, 83) the scope of R. S., sec. 3490, which incorporated it in the year 1874 remains intact and unaffected. *Kendall* v. *United States*, 12 Pet. 524, 625; *In re Heath*, 144 U. S. 92, 93, 94.

Regulations under the PWA statutes also appear in the Appendix.

Statement.

On January 25, 1940, the petitioner on behalf of the United States and as well in his own behalf brought this action in the Western District of Pennsylvania against 52 defendants to recover the penalties and double damages, provided by R. S., sec. 3490, resulting from acts in furtherance of a conspiracy by defendants to defraud the United States in violation of R. S., sec. 5438.

The complaint charged that grants of money were made by the United States, through the Public Works Administration, to aid in the construction of numerous projects by municipalities and school districts (referred to as "sponsors") in and about the City of Pittsburgh (R. 10); that such sponsors advertised for bids for contracts for the performance of the electrical work involved in such projects (R. 10-11); and that the defendants, all members of the Electrical Contractors Association of Pittsburgh, Inc., thereupon conspired to defraud the United States (R. 11). It alleged that, in furtherance of, and pursuant to, the conspiracy, they engaged in sham and collusive bidding, falsely and fraudulently submitted bids, received awards and entered into contracts, submitted false and fraudulent claims for payment thereof, made false and fraudulent statements, and made false and fraudulent certificates knowing them to contain fraudulent or fictitious statements or entries (R. 14). The answer of defendants denied substantially all the allegations of the complaint (R. 33, 34, 35).

After a lengthy trial, the jury returned a verdict against all the defendants save one in the sum of $315,100.91, being $203,100.91 damages and $112,000 penalties (R. 338). Judgment was entered accordingly (R. 389). On motion for new trial (R. 341-346) the court entered an opinion and order

overruling the motion (R. 346, 387). The circuit court of appeals, however, held that the statute authorizes recovery only when the defendants present a direct "claim upon or against the government of the United States or any department or officer thereof" (R. 475), and that the evidence failed to show that the defendants had made or presented such a claim (R. 479). It entered judgment of reversal accordingly (R. 485).

The Facts.—As to each of the projects here involved, with unimportant variations, the evidence showed that the sponsor—that is, the municipality or school district—made application to the Federal Emergency Administration of Public Works for a grant (R. 82, 537; 44 C. F. R. 216.2-216.3[2]). An estimate of cost of the project, detailed according to each branch of the work, viz. general construction, heating, plumbing and electrical, was submitted on PWA Form 231 (R. 498). The grant was in each case made on what PWA approved as the proper estimate of the cost of the project (R. 498-499, 500). The Public Works Administration addressed a formal offer to the sponsor incorporating the standard terms and conditions of PWA Form 230 (R. 157-179) by reference (R. 179-180; 497-498), and the latter by its acceptance created the Finance Agreement between the Government and the municipality (R. 116-117, 181-184; 44 C. F. R. 222.1).

The grant or agreement of the Public Works Administration was to pay 45% of the actual cost of the project but

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[2] The President, under the authority of Section 201(a) of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 200, delegated to the Federal Emergency Administrator of Public Works authority to prescribe rules and regulations (Executive Orders Nos. 6252, August 19, 1933, and 6929, December 26, 1934, 44 C. F. R. 201.1, 201.2 and 201.4). The regulations are collected in Title 44, Ch. II, of the Code of Federal Regulations. Those which are particularly pertinent are reprinted in the Appendix *infra*.

not in excess of a specified sum representing 45% of the estimated cost (R. 45, 88-89, 179).[3] The contract provided that a separate account, referred to as the "Construction Account," should be set up in a bank; that all grant payments by the United States, the sponsor's funds, and any other moneys required to pay the cost of the project were required to be deposited promptly in the Construction Account; and that: "Payments for the construction of the Project will be made only from the Construction Account. • • • Moneys in the Construction Account will be expended only for such purposes as shall have been previously specified in a signed certificate of purposes filed with and accepted by the Government" (R. 163; cf. 44 C. F. R. 222.20, 222.21).

After execution of the Finance Agreement between the Public Works Administration and the local municipality, the latter advertised for bids on the work (R. 43-44, 217). Each advertisement disclosed that the work was a Public Works Administration project (R. 43-44, 217). Attached to the successful bids of the defendant-contractors on all projects involved herein, with the exception of the Pittsburgh Municipal Airport Project, were signed statements or certificates of non-collusive bidding (R. 225-226). The contract documents, which included the certificates of non-collusive bidding (R. 217, 225-226), were required to be, and were, submitted to PWA officers for approval (PWA Form 230, R. 165, 217, 495, 502).

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[3] Of the 47 projects as to which the plaintiff claimed damages at the close of the trial, only two involved 30% limitation of the federal grant (R. 331). The Act of June 16, 1933, c. 90, Tit. II, Sec. 203 (a), 48 Stat. 195, 202, provided that "no such grant shall be in excess of 30 percentum of the cost of the labor and materials employed upon such project." The Work Relief and Public Works Appropriation Act of 1938, Joint Resolution of June 21, 1938, c. 554, Sec. 201(d), 52 Stat. 809, 816, provided that "no grant shall be made in excess of 45 percentum of the cost of any non-Federal project."

Collusion in bidding.—As stated in the opinion of the circuit court of appeals (R. 472):

> The appellants, the officers and members of the Electrical Contractors Association of Pittsburgh, conspired to rig the bidding on these projects. The pattern of the collusion was the informal and private averaging of the prospective bid which might have been submitted by each appellant. An appellant chosen by the others would then submit a bid for the averaged amount and the others all submitted higher estimates. The government was thereby defrauded in that it was compelled to contribute more for the electric work on the projects than it would have been required to pay had there been free competition in the open market.

Thus both courts below recognized the collusion in bidding and the consequent fraud upon the United States.

Claims by the contractors.—As the work progressed, the defendant contractors were obliged to submit "Periodical Estimates for Partial Payment", PWA Form I-23 (R. 190, 202), for approval by the PWA Resident Engineer Inspector in order to obtain partial payment for the work performed during the preceding calendar month.[4] Such estimates, and their approval by the PWA representative, were required by the Regulations (44 C. F. R. 237.8, 237.13), by the Finance Agreement of the sponsor with the Government (PWA Form 230, R. 174, 175-176), and by the terms of each contract (R. 119, 232, 234, 48, 59, 61-62, 64, 66, 112, 521, 536). Thereafter, the estimate was turned over to the sponsor for payment from the Construction Account (R. 41, 48, 64).

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[4] It may be noted that this PWA Form I-23, used for all claims submitted by the contractors, called special attention to the fact that claims against the United States were involved, by citing federal statutes punishing presentation of false claims against the United States (R. 190, 191, 202, 204).

Requisitions by the municipalities.—Pursuant to the Regulations (44 C. F. R. 230.21-230.25), the Finance Agreement between the United States and the municipality provided that the government would pay for deposit in a specially established Construction Account 15% of the previously estimated cost on advance requisition by the sponsor after acceptance of the Government's offer, 10% upon a first intermediate requisition when the sponsor had deposited its share in the same account, 10% upon a second intermediate requisition submissible when the project was 50% completed, and 10% upon final requisition after completion of the project and final audit, but not in excess of 45% of the actual cost of the project "as determined by the Administrator" (PWA Form 230, R. 157, 160-162).

The requisitions or claims of the municipalities were required to be supported by the claims of the contractors, as "documents necessary to support such requisitions" (R. 162, 163). The terms and conditions of the Finance Agreement provided that the sponsor would require of the contractor and submit to the PWA representative, on forms supplied by the Government, "Periodical Estimates for Partial Payment" (R. 174). These periodical estimates were the PWA Form I-23 above referred to, upon which the contractor in each instance made his monthly claim for payment (R. 202-207). When grant requisitions upon the United States were made by the sponsor, these monthly estimates were part of, and included in, the records audited by the PWA in determining how much of the sponsor's requisition or claim against the United States was to be paid (R. 505-507, 528).[5]

[5] PWA auditors examined and audited the accounts and all costs pertaining to each project before each disbursement of moneys by the PWA under the grant, in order to determine items of cost proper to be included in computing the amount of the grant earned by the sponsor under its Finance Agreement (R. 53, 107, 522, 528, 529; 44 C. F. R. 202.22, 230.1, 230.2). And the regulations specified that, in reviewing the sponsor's

Decision of the district court.—In its opinion overruling the motion for new trial, the trial court pointed out that there was in each case evidence as to two types of payments, each based on a particular type of claim, showing: (1) That the granted money was initially paid out of the United States Treasury to be deposited in the joint Construction Account only upon allowance of requisitions by the municipalities based on the estimates submitted by the contractors to the sponsor and by it in turn submitted as supporting documents for its requisition on the Public Works Administration; (2) That no payments could be made by the sponsor from federal funds in the Construction Account to the contractor without approval by the local PWA representative of the estimates submitted monthly by the contractor. The court said (R. 349):

> The money the Government agreed to contribute to these projects was paid out in the course of the carrying-out of these projects only on sworn estimates submitted by the contractor to the Administrator, and approved by him on Federal Form (I-23). The Federal funds allotted to each project were placed in a bank approved by the Administrator, which bank account contained also the funds of the local authority. This special fund was from time to time checked by a representative of the Administrator; and no payments could be made therefrom to the contractor doing the work, except with the approval of the Administrator, which approval was noted on Form I-23 above mentioned.

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requisition, the Regional Director should "compare the financial entries on the requisition with the project audit made by the division of accounts" (44 C. F. R. 230.24).

That the certificate of non-collusive bidding in the defendant's bid was a material part of the documents considered in passing on the question of payment by the United States under the grant in each case is shown by the reconciliation sheet included in the part of the record brought here, for it shows a suspension of the claim of the City of Pittsburgh based on the contract of one of the defendants because of the alleged collusive bidding (R. 211, 215, 533).

Decision of the circuit court of appeals.—The circuit court of appeals, although it recognized that "the government was • • • defrauded in that it was compelled to contribute more for the electric work on the projects than it would have been required to pay had there been free competition" (R. 472), reversed on the ground that (R. 475, 479):

> The statutory language here important authorizes recovery only where the defendants presented a "claim upon or against the government of the United States or any department or officer thereof." • • •
>
> The claims of the defendants • • • were simply against the local municipalities. Since the defendants had no claim upon or against the United States, this action was not authorized by the informer statutes.

Specification of Errors To Be Urged.

The circuit court of appeals erred:

1. In holding that a right of recovery was not established under the first clause of R. S., sec. 5438, which makes liable "every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent."

2. In holding that the only statutory language important in the case is that of the first clause of R. S., sec. 5438.

3. In failing to hold that a right of recovery was established under the second clause of R. S., sec. 5438, which makes liable "every person • • • who, for the purpose of obtaining or aiding to obtain the payment or approval of [any claim upon or against the Government of the

United States] makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry."

4. In failing to hold that a right of recovery was established under the third clause of R. S., sec. 5438, which makes liable "every person • • • who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim."

5. In reversing the judgment of the district court.

Reasons For Granting the Writ.

The circuit court of appeals, in holding the statute to be too narrow to encompass the admitted fraud and injury in the common situation here presented, has severely limited and in large degree emasculated a statute addressed to the cure of a persistent and recurring evil at a time when opportunity and occasion for its violation is increasing. The fact that this is a *qui tam* suit is irrelevant since the rights of the United States suing in its own name under the same statute, R. S., sec. 3490, could ascend to no greater dignity. The decision, therefore, vitiates the only existing Congressional enactment adequate to make the United States whole on account of frauds depriving it of money or property.

Revised Statutes, sec. 5438, standing alone is merely a criminal statute. But R. S., sec. 3490, incorporates it and creates in the United States a right to recover double the amount of damages for pecuniary or property loss suffered by reason of fraud in violation of R. S., sec. 5438, together with a civil penalty of $2,000 for each such violation. Originally adopted in 1863 when frauds against the Government

were prevalent in connection with Civil War contracts, one of its objectives obviously was to reimburse the Government for the heavy expense of investigation as well as for the loss directly resulting from the fraud.[6] Cf. *Stockwell* v. *United States*, 13 Wall. 531, 547, 551; *Helvering* v. *Mitchell*, 303 U. S. 391, 401. No other federal statute thus adequately protects the United States by permitting recovery of double damages. Hence, the suggestion of the circuit court of appeals that the United States or the municipality in each case may bring suit for simple damage on account of fraud and be made "completely whole" (R. 479) ignores Congressional policy, deprives the United States of a right of recovery sufficient to include the expense of investigation and litigation, abolishes a civil penalty, and nullifies the very purpose of the statute.

The portions of R. S., sec. 5438, here relevant are the first three clauses proscribing three distinct offenses with reference, respectively, to "every person"—

> [1] who makes or causes to be made or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or
>
> [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or

[6] Revised Statutes, sec. 5438, was derived from the Act of March 2, 1863, c. 67, secs. 1 and 3, 12 Stat. 696, 698; and R. S., sec. 3490, was derived from section 3 of the same act. In the respects here pertinent they are substantially identical with the language of their percursor. R. S., sec. 3490 is now inaccurately codified as 31 U. S. C. sec. 231.

> [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim.

But the circuit court of appeals ignored the second and third clauses of the statute altogether, and treated the statute as though it consisted solely of the first clause, saying (R. 475):

> The statutory language herein important authorizes recovery only where the defendants presented a "claim upon or against the government of the United States or officer thereof."

By narrow and erroneous construction of this language of the first clause it held that no acts in violation of that clause had been established. In thus narrowly construing the first clause, and in thus entirely disregarding the second and third clauses, the court below has defeated the plain intention of Congress.

1.

The narrow construction of the first clause of R. S., sec. 5438 is not warranted by the terms of the statute and is in conflict with decisions of the circuit courts of appeals for other circuits.—That the claim of the contractor in each instance was a claim against the United States is established by the evidence. As shown in the statement of facts above, the grant in each case was made by the United States only upon what PWA approved as the proper estimate of the cost of the project (R. 498-499, 500). The plans and specifications, prepared by the sponsors through their architects and engineers, were required to be and were submitted to PWA for approval (R. 530, 535-536, 537-538). The sponsor in advertising for bids plainly stated that a PWA project was involved (R. 217, 225). The grant payments

by PWA were placed in a special, ear-marked Construction Account together with funds of the sponsors, and were subject to use solely for the construction of the particular project under the terms and conditions of the contract between PWA and the sponsor (R. 55-56, 61-62, 64, 89, 97, 99-100, 107, 509, 525). All plans and specifications, contract documents, performance of work, construction accounts, payrolls, and payments of money were supervised, regulated, and approved by PWA (R. 51, 74, 79, 80, 86, 111, 495, 502, 503, 529, 531, 535-536, 537-538).[7]

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[7] In addition to the record here, the nature of the transaction has been set forth by the Secretary of the Treasury in an elaborate report—pursuant to Sen. Res. No. 150, 76th Cong., 1st Sess., 84 Cong. Rec. 7954-7955, respecting the financial operations of federal lending and spending agencies—of which the following excerpts are here pertinent (Sen. Doc. No. 172, 76th Cong., 3d Sess., v. 26, pt. 1, February 15, 1940):

"Disbursement of funds is made by the Public Works Administration only after approval of a certificate of purposes setting forth the proposed use of the funds." (P. 274.) "A properly certified voucher is issued for each disbursement, after the project costs have been audited at the site of such project and such costs found to be in accord with the terms of the contractual arrangement. • • • The determination of loan and grant payments • • • requires that the Government have complete knowledge of all costs incurred for each project. • • • The scope of the audits includes an examination of all basic records supporting costs incurred in connection with each project • • • Among the important features covered by these audits are the determination of whether or not loan and grant funds are being expended in accordance with previously approved estimates, whether there has been compliance with Public Works Administration terms, conditions, and requirements, and the identification of any expenditures which may have been improperly made from the project funds or which may not be eligible for participation in the grant." (P. 275.) "All disbursements, other than administrative expense, are based upon contractual arrangements which have been checked and approved. The vouchers are thoroughly checked to ascertain if payments are correct, and the amount paid is dependent upon the result of an audit made at the site of the work and specific clearance by all interested divisions of the Public Works Administration. Only after that is it certified to the disbursing officer for payment." (P. 276.)

Each claim by a contractor was made on PWA Form I-23 headed "Federal Emergency Administration of Public Works", entitled "Periodical Estimate for Partial Payment", and including a printed statement that—

> The project to which the contract herein referred to relates is a non-Federal project the construction of which the United States of America, through the Federal Emergency Administration of Public Works, is aiding the owner in financing (R. 190, 191).

Each was submitted to a federal officer for approval before payment. Thus the situation falls precisely within the plain language of the first clause of R. S., sec. 5438, imposing liability on "every person who * * * presents or causes to be presented, for payment or approval, to or by any person or officer in the civil * * * service of the United States any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent."

The moneys representing that portion of the Federal grant paid out of the Treasury to the local municipalities on requisition and deposited in the special Construction Account were earmarked as moneys of the United States, and the account was supervised in every detail by federal officers. In *Madden* v. *United States*, 80 F. 2d 672 (C. C. A. 1), cert. denied 297 U. S. 710, the court said (p. 676):

> Defendant contends that there was a fatal variance between the proof and the indictment. His argument is that funds granted by the Federal Emergency Relief Administration to the Emergency Finance Board, a state agency, became state funds and thereafter no title thereto existed in any federal agency and when the Emergency Finance Board transferred part of its funds to the City of Boston for payment of Boston Public Library employees, title to such funds passed to the City of Boston, and thereafter the power of disposition of such funds was in the City of Boston and

no Federal agency had any power over them. This contention is not sound. All projects carried on with money derived from the federal government had to be approved by the Federal Administrator. Any diversion of such funds from the project to which they were assigned was a diversion of government money. As hereinbefore stated, all funds allotted by the Federal government for the relief of unemployment even though disbursed by state agencies were earmarked as federal funds, and if diverted from the use for which they were granted it constituted a fraud upon the government.

In *Langer* v. *United States*, 76 F. 2d 817 (C. C. A. 8), the court said (p. 823):

> Appellants next contend that the indictment charges no offense because if the money were money of the United States prior to its being turned over to North Dakota officials, it then ceased to be such, and appellants could not obstruct nor defeat the administration of the federal statutes because they were administering funds belonging to the state, and were not federal officials. In this connection it is urged that it was the intent to pass full and complete title to the money when the Reconstruction Finance Corporation, or the Administrator under the Federal Emergency Relief Act of 1933, loaned it to the state, or otherwise devoted it to the use of the state. Whether the money is granted or loaned by the Reconstruction Finance Corporation or the Administrator under the Federal Relief Act of 1933, it is money of the Reconstruction Finance Corporation.

See to the same effect *United States* v. *Harding*, 65 App. D. C. 161, 81 F. 2d 563, 568. The holding of the court below presents a conflict with these decisions. Moreover, whatever may have been the arrangement in those decisions, in the present case the facts disclose clearly that the United States did not relinquish control of the funds.

The moneys initially came from the Federal Treasury and could not rightfully be disbursed to the contractors on their Form I-23 monthly periodical estimates until approval thereof by the local PWA resident engineer inspector (R. 41, 48, 56-57, 59, 61-62, 66, 119, 521, 536; Ex. 107, R. 185, 190, 193-194; Ex. 245, R. 202, 207). In submitting its monthly claim for allowance by the PWA resident engineer inspector, therefore, the defendant contractor in each instance knew that it was by this action inducing the last step necessary to complete the relinquishment by the United States of its control over its moneys on deposit in the Construction Account. This is all that any claim against the United States can do.

It is not necessary that the claim be formally addressed to the United States. A claim is just as clearly a claim against the United States when submitted for approval to an officer of the United States, so long as it involves a claim against, or in derogation of, the pecuniary or property right of the United States. See *United States* v. *Mercur Corporation*, 83 F. 2d 178, cert. denied 299 U. S. 576. The first clause of the statute here involved, moreover, in terms includes the presentation of such claims "for payment or approval, to or by any person or officer in the civil • • • service of the United States."

Finally, in its construction of the first clause of the statute, to which it arbitrarily limited its attention, the court below ignored further important and controlling language. Even if it be assumed that these were technically claims against the municipalities rather than against the United States, still the presentation of the contractors' claims to the municipalities, in the words of the first clause of the statute, "causes to be presented" in turn a claim by the municipalities "against the Government of the United States" which the contractors knew "to be false or fraudulent". The facts supporting the cause of action under this

portion of the first clause are more fully set forth below in connection with the next point.

2.

The circuit court of appeals ignored the second clause of R. S., sec. 5438, and thus both nullified the clearly expressed intention of Congress and deprived the United States of substantial rights under the statute.—The provisions of R. S., sec. 5438, evince an intention on the part of Congress to protect the United States against pecuniary loss by fraud, no matter how indirect the cause. The first clause relates to the presentation of a "claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent". The second clause relates to anyone who, for the purpose of "*aiding to obtain*" the payment or approval of a claim against the United States or any department or officer thereof, "makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry."

Thus, plainly in this second clause Congress intended to reach not the direct presentation of a fraudulent claim against the United States covered by the first clause, but rather a separate and distinct offense: The making or causing to be used of a false claim, certificate, or affidavit—whether or not in itself it be a "claim against the United States"—if such claim, certificate, or affidavit be "for the purpose of obtaining or *aiding to obtain* the payment or approval of a claim against the United States" by another—in this case the municipality. *United States* v. *Coggin*, 3 Fed. 492, 495; see *United States* v. *Strobach*, 48 Fed. 902, 909.

Acts by defendants in violation of the second clause of R. S., sec. 5438, were clearly established. The evidence

showed that, in furtherance of the conspiracy, claims and certificates were made to the municipalities and thus caused to be used in turn by the municipalities in aid and support of the latter's claims against the United States for payment under the federal grants. The evidence further showed that they were included in the Government audit and relied upon by the administrative officers of the Government in acting upon the municipalities' requisitions of federal funds to be placed in the Construction Account. Thus, these false "claims" and false "certificates" were made by them and caused by them to be used within the meaning of the second clause "for the purpose of obtaining or aiding to obtain the payment or approval of" claims upon the Government of the United States by the municipality in each case. The municipalities, of course, were but the innocent conduits of the fraud of the defendants.

The evidence established that the defendants' contracts were based on fraudulent bidding and that included in the bids was a certificate by the bidder that

> this Proposal is genuine and not sham or collusive, or made in the interest or in behalf of any person, firm or corporation not herein named, and that the undersigned has not directly or indirectly, induced or solicited any other bidder to submit a sham bid, or any other person, firm, or corporation to refrain from bidding and that the undersigned has not in any manner sought by collusion to secure for himself an advantage over any other bidder. (R. 226.)

The successful bid, including the false certificate, was made part of the contract (R. 217-276, 226). Each contract, including the false certificate of the bidder, was submitted to, and initially approved by, the Regional Director for PWA (R. 217).

As shown above, the contractor in each case also submitted "claims" for payment on monthly "Periodical Estimates for Partial Payment, PWA Form I-23".

The municipality then—upon the contractors' certificates and claims—in each case made requisitions upon the United States for moneys to be deposited in the Construction Account (R. 160-162). There surely can be no denial that these requisitions were claims against the United States. And it is equally clear that these requisitions were, within the meaning of the statute, aided by the "certificates" and "claims" (Form I-23) of the contractors. The requisitions were, it may be repeated, based on work done in part by the defendant contractor on each project. In determining what portion of the amount claimed in the requisition of the municipality should be paid, auditors for the PWA audited the accounts of the municipality pertaining to the project and, in so doing, reviewed and took into account the contractors' fraudulent Form 1-23 monthly estimates or claims for payment as part of the basis of the claim of the municipality against the United States (44 C.F.R. 202.22; R. 53, 107, 504, 505-506, 507, 522, 528, 529). The audit in each case showed the monthly estimates of the contractors (R. 53) and, under the regulations, was also used by the Regional Director in passing on the financial entries in the requisition of the sponsoring municipality (44 C.F.R. 230.24). By the same regulation it was provided that the Executive Officer in Washington in making a final review was to make a check against "all pertinent project records", which obviously would include in each case the original contract with its false certificate of non-collusive bidding.[8]

[8] These were duly published regulations as to which defendants are charged with knowledge, since they have the force of law. *United States v. Grimaud*, 220 U. S. 506, 517-521; *Hampton & Co. v. United States*, 276 U. S. 394, 409.

It is thus clear that the contractors' false certificates and fraudulent Form I-23 claims had the effect, and were "for the purpose of * * * aiding to obtain the payment or approval" of the requisitions of the municipalities upon the United States. The defendant contractors, in the language of the statute, made and "caused [these false certificates and claims] to be used" by the municipalities against the United States. For it is axiomatic that the conspirator defendants are presumed to intend the ordinary, natural, probable, or necessary consequence of their voluntary, intentional, and deliberate acts. *United States* v. *Patten*, 226 U. S. 525, 543; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 243. Accordingly, the evidence clearly brought the defendants within the language of the second clause of R. S., sec. 5438, imposing liability upon any one "who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim [against the United States] makes, uses or causes to be made or used, any bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition knowing the same to contain any fraudulent or fictitious statement or entry."

But the circuit court of appeals failed even to consider whether a cause of action had been established under this plainly pertinent language of the second clause of R. S., sec. 5438. In so doing, the court violated the well-established rule that effect must be given to all parts of a statute. *D. Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *McDonald* v. *Thompson*, 305 U. S. 263, 266.

3.

The court below ignored the third clause of R. S., sec. 5438, which imposes civil liability upon any person who enters into "any agreement, combination, or conspiracy to defraud the Government of the United States" and pursuant

thereto presents "any false or fraudulent claim" whether against the United States or against a third party so long as the effect, as here, is to defraud the United States.—The third clause of R. S., sec. 5438, evinces still further Congressional intention to assure that the statute would embrace every possible type of fraud in connection with claims paid in whole or part from Federal funds. It was obviously intended to apply where claims in effectuation of the conspiracy are made, whether directly against the United States or against third parties, if the result is to defraud the United States. For, unlike, and in sharp contrast with, the language of the first and second clauses, the word "claim" in the third clause is not limited to those "against the United States." The third clause by its terms embraces "any false or fraudulent claim." Since Congress elected to frame three separate clauses, the difference in phraseology in the third clause cannot be disregarded.

Here the conspiracy, in the form of collusive bidding, is shown, admitted, and expressly found by both courts below. The third clause of R. S., sec. 5438, is directed at any form of joint action "to defraud the Government of the United States." Even the court below acknowledges that, by the acts of the defendants, "the government was • • • defrauded in that it was compelled to contribute more for electrical work on the projects than it would have been required to pay had there been free competition" (R. 472).

This tangible and pecuniary fraud upon the United States consummated by claims—whether regarded as falling within the first, second, or third clauses of R. S., sec. 5438—is plainly within the scope of the statute. It is a travesty to assume, as does the court below, that Congress intended to protect against claims presented to federal departments at Washington but not against claims presented to a federal officer or the sponsor of a PWA project at

Pittsburgh, where a fraud involving federal funds results in either instance.

Importance of the Question.

The question here is whether the plain language of the statute is to be judicially limited and in large part nullified. No other legislation confers the right to recover penalties and double damages for frauds in connection with claims against the United States. The pressing need for such a remedy for this specific evil has been recently recognized in this Court. See *United States* v. *Cooper Corp.*, 312 U. S. 600, 614. Judicial recognition of the plain intent of Congress and the preservation of the remedies and safeguards created by it require that the decision of the court below be brought here for review.

Wherefore it is respectfully submitted that this petition for certiorari should be granted.

HOMER CUMMINGS,
CHARLES J. MARGIOTTI,
Counsel for Petitioner.

June, 1942.

APPENDIX.

Revised Statutes.

Sec. 3491. The several district courts of the United States * * * within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done, or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

Title 44—Public Property and Works.

Chapter II—Federal Emergency Administration of Public Works.

Section 201.1 Appointment of Administrator. Pursuant to the authority of "An act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes", approved June 16, 1933, and in order to effectuate title II—Public Works and Construction Projects—thereof; I hereby appoint Harold L. Ickes to exercise the office of Federal Emergency Administrator of Public Works.

201.2 Delegation of functions and powers. (a) Pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 200; 40 U. S. C. 401), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

(1) To establish such agencies, to accept and utilize such voluntary and uncompensated services, and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary, and to prescribe their authorities, duties, responsibilities and tenure.

(2) Under the conditions prescribed in section 203 of said Act (48 Stat. 202; 40 U. S. C. 403), to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202 of said Act (48 Stat. 201; 40 U. S. C. 402); upon such terms as he shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project; to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project and to lease any such property with or without the privilege of purchase; and to aid in the financing of such railroad maintenance and equipment

as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities.

201.4 Delegation of additional functions and powers. By virtue of and pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, 48 Stat. 195 (hereinafter referred to as the "Act"), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

(a) In his discretion, and upon such terms and conditions as he may prescribe, to sell, assign, transfer, and deliver all securities or any part thereof purchased under the authority of section 203 of the said Act (48 Stat. 202; 40 U. S. C. 403) and of title II of the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934, 48 Stat. 1021, and to apply the proceeds as prescribed by section 203 of the said Act and said Emergency Appropriation Act, fiscal year 1935.

(b) To alter, amend, or waive any or all rules and regulations set forth in Executive Order No. 6252 of August 19, 1933, and any other rule or regulation promulgated by the President under the authority of section 209 of said Act, and to prescribe pursuant to the authority of the said section 209 any other rules or regulations as are necessary to carry out the purposes of said Act; Provided, however, no rule or regulation the violation of which is made punishable by fine or imprisonment under the said section 209 shall become effective until approved by me.

202.22 Auditors and engineer inspectors. PWA auditors examine and audit the accounts pertaining to such projects. PWA engineer inspectors observe the construction of PWA projects and make reports concerning the same.

216.2 Requirements relative to applications. All applications for financial aid must be in writing and must be prepared and submitted on forms and in accordance with instructions issued and distributed from time to time by PWA through its authorized field representatives. For further information, prospective applicants for financial aid should consult the PWA Regional Director of the region in which the prospective applicant is located.

216.3 Examination of applications. Applications for financial aid are examined, in the first instance, by the Regional Director's Office. Thereafter, the Regional Director transmits the applications to the Central Office with appropriate engineering, finance, legal and other reports and recommendations. The Central Office then conducts further examinations of the applications and the Directors of the appropriate Divisions in the Central Office as well as other designated PWA employees make any necessary additional reports and recommendations pertinent thereto. All such reports and recommendations are merely advisory to the Administrator. The foregoing is only a general outline of the existing procedure in such matters. The procedure may vary from time to time in order to comply with applicable new Congressional enactments and Executive orders, in which event detailed instructions will be issued and distributed by PWA through its authorized representatives. For further information in regard to these matters, prospective applicants should consult the Regional Director of the region in which they are located.

* * * * * * * * *

222.1 General summary of finance agreement. The finance agreement, to which the United States of America and the applicant are parties, consists of an offer on the part of the Government and the applicant's acceptance thereof. Such agreement contains the terms and conditions upon which the Government offers to make a loan and grant, a loan only or a grant only, as the case may be. It describes the project briefly and states the amount of the loan and grant, the loan only or the grant only, as the case may be. In the case

of a loan and grant or a loan only, it also sets forth the method of making the loan, the type and denomination of the security which the Government agrees to purchase, the interest rate, the place of payment, registration privileges and maturities.

• • • •

projects the grant base will depend upon the cost of the project.

230.2 Computation. The computation of the grant base will be made by auditing all costs incurred by the applicant in constructing the approved project and then selecting those items of costs which are administratively determined to be eligible for inclusion in the grant base. With certain restrictions and exceptions, the cost of equipment which is called for by the finance agreement as a permanent part of the project will be includable in the grant base.

* * * * * * *

230.21 Purpose. A grant requisition consists of a public voucher and certain supporting documents which must be prepared by the applicant for the purpose of obtaining a payment on account of the grant.

230.22 Kinds. Grant requisitions on PWA non-Federal NIRA projects are known as "advance", "partial", "intermediate", "semi-final", "final", and "supplemental final". Grant requisitions on * * * PWA non-Federal projects are known as "advance", "intermediate", "semi-final", "final", and "supplemental final".

230.23 Submission. An advance grant requisition may be submitted immediately after the PWA finance agreement has been entered into. The payment of an advance grant is entirely optional with the Administrator. Partial, intermediate and semi-final grant requisitions may be submitted at specified times during the course of construction of the project. The final grant requisition may be submitted only after the project is entirely completed and all project costs are known. Supplemental final grant requisitions are used when necessary to adjust the grant account.

230.24 Review. When the applicant has prepared a grant requisition in the required number of copies, together with the supporting documents, the applicant must deliver it to the engineer inspector assigned to the project. The engineer inspector will review it for completeness, eligibility for payment as affected by the physical condition of

the project, compliance with the PWA finance agreement and the established policies of PWA. On completion of his review the engineer inspector will submit the requisition with his recommendations to the Regional Director who will give due consideration to the recommendations of the engineer inspector and will compare the financial entries on the requisition with the project audit made by the Division of Accounts. The Regional Director will then submit the requisition with his recommendations to the Executive Officer of PWA at Washington, where it will be subjected to a final review and to a check against all of the pertinent project records.

230.25 Payment. After a grant requisition has been finally cleared and the amount of the earned grant has been administratively determined at the Washington Office of PWA, payment on account of the grant will be made to the applicant by means of a warrant on the Treasury of the United States of America.

* * * * * * * *

237.8 Construction reports. The owner must require that there shall be submitted to it by each construction contractor and must, in turn, submit to the Administrator's authorized representative or agent, schedules of the costs and quantities of materials and of other items which schedules shall be in such form and shall be supported as to correctness by such of the estimates upon which they are based as such representative or agent may require. The owner must also require that there shall be submitted to it by each such contractor and must, in turn, submit as above-stated, the following records on forms to be supplied by the Government: Detailed Estimate, and Periodical Estimates for Partial Payment.

* * * * * * * *

237.13 Payment. Not later than the 15th day of each calendar month, the owner must make partial payment to each construction contractor on the basis of a duly certified and approved estimate of the work performed during the preceding calendar month by the particular contractor, but

must retain at least 10 percent of the amount of each such estimate until final completion and acceptance of all work covered by the particular contract. The owner must require that each such contractor shall pay: for all transportation and utility services not later than the 20th day of the calendar month following that in which such services are rendered; for all materials, tools, and other expendible equipment, to the extent of 90 percent of the cost thereof, not later than the 20th day of the calendar month following that in which such materials, tools, and equipment are delivered at the site of the project, and the balance of the cost thereof not later than the 30th day following the completion of that part of the work in or on which such materials, tools, and equipment are incorporated or used; and to each of his construction subcontractors, not later than the 5th day following each payment to such contractor, the respective amounts allowed such contractor on account of the work performed by such subcontractors, to the extent of each such subcontractor's interest therein.

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No. 173

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, EX REL. MORRIS L. MARCUS, AND MORRIS L. MARCUS IN HIS OWN BEHALF,

Petitioners,

vs.

WILLIAM F. HESS ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER.

HOMER CUMMINGS,
CHARLES J. MARGIOTTI,
Counsel for Petitioners.

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Petitioners,

vs.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER.

Without attempting to treat categorically of all points raised in the Brief in Opposition—since many are obviously without merit or are irrelevant—this reply is filed in answer to certain of respondents' contentions.

1. *Respondents have shown no authority to speak for the Solicitor General.*—The suggestion (Br. In Opp. 1-2) that the Government does not want a certiorari is for the Government to make. Up to now the Solicitor General has not found it necessary to rely on others to present his

views to this Court. In view of his freedom in that respect (Rule 7(a)), we know of no reason which should now impel the Court to accept unauthorized representations of others on his behalf.

2. *The laws of Congress conclusively establish public policy.*—The contention that *qui tam* suits are opposed to public policy or that the views of the Department of Justice or of the courts are properly to control or in any way limit the plain enactment of the Congress (Br. in-Opp., pp. 2, 6) of course cannot be entertained here in view of the reiterated statements by this Court that the policy or wisdom of Federal legislation and its appropriateness as a remedy for the evils which it seeks to eliminate are matters for Congress alone to determine. They are not matters with which the courts are concerned. *Helvering* v. *Davis*, 301 U. S. 619, 640; *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 324; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154; *Guaranty Trust Co.* v. *Henwood*, 307 U. S. 247, 259; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 394.

Indeed, R. S. Sec. 5438, read together with the informer sections, has long been recognized as a "useful and necessary statute" (*Ex parte Shaffenburg*, Fed. Cas. No. 12,696 at p. 1146). The soundness of the policy of the statute was recognized in *United States* v. *Griswold*, 24 Fed. 361, 366:

> The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of

personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

There can be no denial that there presently exist the same reasons which were the occasion for the original passage of R. S. sec. 5438. Reports of Congressional investigating committees attest the actuality of the evil and public recognition of the necessity of immediate steps for its suppression. Clearly, it is not for respondents to argue that the propriety of enforcement of existing law is to be weighed against other alleged counter-balancing considerations. And, as this Court has held, neither is it for the courts. Congress has spoken. Short of constitutional inhibitions, it is neither for the judiciary nor the executive to emasculate this law either by construction or arbitrary refusal to give effect to all its provisions.

3. *The evidence plainly established a cause of action under R. S. sec. 5438.*—Under Point II in their brief Respondents advance a number of other contentions equally fallacious or inapplicable.

(a) *Public policy.*—The asserted rule that "informers are not favored" has no application here. In the first place, no construction of an informer statute is involved. The decision below was the result of a refusal to give any effect to the plain provisions of a statute (R. S. sec. 5438) which makes no reference whatsoever to *qui tam* proceedings. Manifestly, the section cannot be arbitrarily construed to mean one thing when the United States sues under it and to mean something else when another brings suit under it in behalf of the United States.

(b) *Statutory construction.*—The rule suggested by respondents (Tr. in Opp., p. 7), that penal statutes are to

be strictly construed, has long been disavowed by this Court. In *United States* v. *Bowman*, 260 U. S. 94, it was held (p. 102):

> "Penal provisions like all others are to be fairly construed according to the legislative intent as expressed in the enactment." They are not to be strained either way.

More recently, it was held (*United States* v. *Raynor*, 302 U. S. 540, 552):

> No rule of construction, however, requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope —nor does any rule require that the act be given the "narrowest meaning." It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress.

This Court recognizes that statutes, such as this, to safeguard the fisc and to reimburse the government for the heavy expense of investigation plus the loss from the fraud are clearly remedial in character. *Helvering* v. *Mitchell*, 303 U. S. 391, 401. As such, of course, they should be liberally construed to achieve their purpose. *Stewart* v. *Kahn*, 11 Wall. 493, 504; *Farmers', etc., Nat. Bank* v. *Dearing*, 91 U. S. 29, 35; *Miller* v. *Robertson*, 266 U. S. 243, 248.

In the instant case, petitioner asks no more than that the action of the court below in arbitrarily nullifying the second and third clauses of the statute be corrected.

(c) *Application of statute.*—Respondents resort to the contention, successfully made in the court below, that R. S. sec. 5438 applies only where the defendant, either alone or acting jointly with others, has "made or presented" a false claim against the United States "based upon the Government's own liability to the claimant" (Br. in opp., pp. 7-15). Insofar as this broad statement embraces more

than the first clause of the statute, it is obviously captious in view of the plain language of the law. *Edgington* v. *United States*, 164 U. S. 361, 362-363. That the defendant need not be the person who makes or presents the claim is apparent from the plain language of the first clause of the section:

> Every person who makes or *causes to be made*, or presents or *causes to be presented*, for payment or approval * * * any claim * * *

and of the second clause:

> or who, for the purpose of obtaining or *aiding to obtain* the payment or approval of such claim * * * (Emphasis supplied.)

The exact contention of respondents was early made and overruled in *United States* v. *Hull*, 14 Fed. 324. The court there said (p. 326):

> The use of this language clearly implies that the statute is intended to cover a case where an attorney, agent, officer, or other person undertakes to get a claim which is false and fraudulent allowed in his own behalf or in behalf of any other party; otherwise the language "aiding to obtain" would have no meaning whatever.

The cases cited by respondent are manifestly inapposite on this point and the language quoted from them, read in context, make it clear that the courts in both the *Mercur Corp. case* (83 F. 2d 178) and *Olson* v. *Mellon* (4 F. Supp. 947) were dealing with situations in which no "claim" had been made by anyone.

With the basic premise falls the entire argument (Br. in Opp. 7-15) upon which the respondents have principally relied—the loophole that they made no claim directly against the United States.

While it might well be argued, contrary to respondents' contention (Br. in Opp., p. 13), that under principles of

agency one of these defendants, had there been no fraud and had he been unpaid, might have recovered against the United States on principles of agency for a disclosed principal, it is unnecessary to discuss that question since this is not a contract action based upon privity, but is in tort for deceit.

(d) *The I-23 estimates of each contractor were fraudulent claims.*—Under the heading "No falsity in any claim" (Br. in Opp. 15), respondents make their basic argument that "there was no falsification or fraud in anything which occurred after the contracts were executed." It seems plain that, in reason, a wrongdoer may not thus insulate the demands by which he obtains the fruits of his fraud from the initial misrepresentations by which he obtained the contract on which the demands are based. In the first place, in *Mandel* v. *Cooper Corp.*, 42 F. Supp. 317, cited by respondent, it is specifically noted that the instant case is distinguishable on its facts. The court in that case was at some pains to point out that (p. 318) "It clearly appears from the affidavits of the defendants that the defendants made no express representations that the prior bids were not the result of any agreement among bidders."

In the case at bar such representations were plainly made. The distinction is all important. It is plain that fraud and misrepresentation may induce not merely the formation of a contract but also some performance under it. 2 Restatement, Contracts, sec. 476, *com. a.* Here, even if it be assumed that the contract itself was a genuine contract fixing the amounts which could subsequently be claimed by respondents on their periodic estimates, it is nevertheless clear that—because the original contract had been obtained by fraud involving an affirmative representation—the periodic claims based on such contract were

also fraudulent claims within the meaning of the statute. *United States* v. *Coggin*, 3 Fed. 492, 495. Certainly this is true where, as here, the fraud in inducing the contract was accompanied by affirmative statements and at the time each periodic claim for payment was made the contractor remained silent knowing that the municipality and the approving Government officer were relying in part on that original affirmative representation of non-collusion. Each demand of the contractor in his Form I-23 estimate, particularly in the silence of the contractor, amounted to a continuing representation accompanying each claim of the Form I-23 monthly periodical estimates (See Petition, pp. 8-9). *Hills Sav. Bank* v. *Cress*, 205 Iowa 306; *First State Sav. Bank* v *Dake*, 250 Mich. 525; *Brown* v. *Lobdell F. & Co.*, 51 Ill. App. 574. It follows that each claim, itself involving this continuing fraudulent representation, was fraudulent in character within the meaning of clause 1 of R. S. sec. 5438.

The applicable rule is set forth in 3 Restatement, Torts, sec. 535:

> One who deals with another in a business transaction or induces another to deal with a third person knowing that the other is relying upon the maker's misrepresentation previously made to induce the other to act in another and earlier transaction is subject to the same liability as though the maker had repeated the representation for the purpose of influencing the recipient's conduct in the later transaction.

(e) *Both the I-23 claims of the contractors and their non-collusion certificates contained false and fraudulent entries and were made for the purpose of aiding to obtain the approval and payment of the claims of the municipalities against the United States.*—The respondents would here limit petitioners to the single question of whether

a case was proved under the first clause of R. S. sec. 5438 (Br. in Opp. pp. 17-18).

But petitioner in his complaint relied on all of the first three clauses of the statute, alleging conspiracy under the third clause and use of false and fraudulent certificates under the second clause (R. 14) and those issues were submitted to the jury (R. 133-134, 137-138). The respondents, in overturning the judgment of the district court, obtained the ruling of the circuit court of appeals that:

> The statutory language here important authorizes recovery only where the defendants presented a "claim upon or against the government of the United States or any department or officer thereof".

Duignan v. *United States*, 274 U. S. 195, 200, cited by respondent, merely held:

> It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.

Since the record here shows that the circuit court of appeals in reversing the trial court's judgment necessarily and specifically held that the language of the second and third clauses was to be disregarded, it clearly passed upon the question of the effect of the second and third clauses of the statute as a matter of law.[1] Therefore, the error of that court on that question, properly specified as error (Pet. 11-12), is clearly here for review.

Recognizing that the judgment of the district court may be sustained under the second clause of the statute if either

[1] It may be noted that the court clearly did not pass on the question of the sufficiency of the evidence to sustain the verdict under the second and third clauses of the statute. It was without power to do so, for no such point was stated in the "Points to Be Raised on Appeal" (R. 399) and much of the evidence was omitted in the Designation of Record on Appeal (R. 392-395). *Krauss Bros. Co.* v. *Mellon*, 276 U. S. 386, 390.

(1) the Form I-23 monthly estimates or claims of the contractors were false or fraudulent or (2) if the certificates of non-collusion were for the purpose of aiding to obtain the payment of claim against the United States, the respondents attack both grounds (Brief in Opp. pp. 18-22) as follows:

(1) It is contended that the periodic estimates contained no "fraudulent or fictitious entry". Respondents point to Ex. 245, R. 202-207, as showing no such entries. Examination of that exhibit shows that it states as "true and correct statement of the contract account" certain amounts alleged to have been "earned". And it contains the further statement that (R. 205):

> All work has been performed and materials supplied in full accordance with the terms and conditions of the corresponding construction contract documents.

But made part of each such contract was the invitation for bids and the bid proposal including certificate of non-collusion (R. 217, 225-226). The certificate of non-collusion was thus obviously part of the contract documents.

It seems plain that, where the contract documents included the certificate of non-collusion and where as a direct result of breach of the certificate of non-collusion the rates at which work was charged were higher than they would otherwise have been, the statement in each I-23 estimate that work had been performed "in full accord with the terms and conditions of the contract documents" could not be other than false and fraudulent and was necessarily a part of the continuing fraud.

(2) Respondents assert (Br. in Opp. 19-20) that there is absolutely no evidence that the certificates of non-collusion were included in the Government audit or that they were relied upon by the administrative officers of the Gov-

ernment in acting upon the municipalities' requisitions of federal funds. The Regulations of the Federal Emergency Administrator of Public Works provided that the requisitions of the municipalities (that is, the claims which respondents purposed to aid in obtaining), should be forwarded to the Executive Officer at Washington, where they "will be subjected to a final review and to a check against all of the pertinent project records" (44 C. F. R. 230.24, see Pet. App'x. pp. 30-31). As pointed out in the Petition (p. 21, note) respondents are charged with knowledge of this regulation. The form of finance agreement used in all cases specifically provided that five copies of all executed contract documents be furnished to the PWA before any work was done thereunder (R. 165). It could not be seriously thought or contended that these construction contracts, most of which embodied the certificate of noncollusion of the contractor, would be other than highly pertinent in determining the propriety of payments to the municipalities on their intermediate and final requisitions to cover the cost of construction.

Clearly beside the point is respondents' further argument (Br. in Opp., p. 21) that the suspension of payment instanced by petitioner (Pet., p. 10) would have been made in any event. It is obvious that, regardless of the ultimate effect in a particular case, these false certificates must be regarded as manifesting a purpose on the part of respondents that they should have their obvious consequence, *i. e.*, aiding to obtain the payment or approval of the claim of the municipality against the United States.

(f) *The requisitions of the municipalities were fraudulent claims against the United States within the meaning of the statute.*—Respondents make the further argument that the claims or requisitions filed by the municipalities with the United States were not "fraudulent claims" within the

meaning of the statute because each was in strict accord with the pre-existing Finance Agreement of each municipality with the United States (Br. in Opp., p. 22). In essence, this merely amounts to saying that the municipality was innocent of any fraudulent intent.

But it is established that a defendant who makes a fraudulent representation to another intending or expecting that it will be exhibited or repeated to a third party for the purpose of deceiving him is liable in tort to the person so deceived. *David* v. *Louisville Trust Co.*, 181 Fed. 10, 14-15; *Jamestown Iron & Metal Co.* v. *Knofsky*, 291 Pa. 60. In the Restatement, Torts, Vol. 3, Sec. 533, the rule is stated:

> The maker of a fraudulent misrepresentation in a business transaction is subject to liability to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person for the purpose of having him repeat its terms or communicate its substance to the other in order to influence his conduct in a particular transaction or type of transaction.
>
> *Comment a. Inducing action between third persons.* The rule stated in this Section is applicable not only where the maker's purpose is to influence by its repetition the conduct of another in a transaction with the maker but also where his purpose is to influence the other's conduct in a transaction with a third person.

Respondents, in effect, contend that the fraudulent representations made by them in their Form I-23 claims and in their certificates of non-collusion, forming part of the supporting fact basis upon which the demands of the municipalities were paid by the United States, were nevertheless so far insulated by the interposition of the municipality as to prevent the claim of the municipality from being a fraudulent claim against the United States within the meaning of the second clause of R. S., Sec. 5438. They

found this contention on the assertion that the claims of the municipalities "contained no false, fictitious or fraudulent statement" (Br. in Opp., p. 22).

This contention ignores the realities of the situation and the plain intent of the law. As here, claims against the Government invariably and necessarily consist of statements of fact in connection with demands for payment; and it would be a perversion of language to say that the fraudulent I-23 estimates which support the demands of the municipalities and the fraudulent non-collusion certificates which with them formed part of the basis upon which those demands were paid by the United States do not constitute the demands of the municipalities a false claim within the meaning of the statute. *Evans* v. *United States*, 11 F. (2d) 37, 39. The character of the claims of the municipalities—that is to say, whether true, genuine, and honest, or false, fictitious and fraudulent—must be determined in view of all of the facts and circumstances attending them. *Dimmick* v. *United States*, 116 Fed. 825, 828; cf. *United States* v. *Downey*, 257 Fed. 366, 368. The fraudulent representations of the respondents, as they come to the United States in support of and to some degree as part of the municipalities' demands, are still actively fraudulent. Moreover, to construe the second clause of the statute as covering these facts is merely to read it as adopting the principles recognized at common law.[2]

It is, therefore, submitted that, within the fair intendment of the statute, the claims of the municipalities against the United States were fraudulent claims so far as these defendants are concerned.

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[2] In 3 Restatement, Torts, sec. 533, *com. d*, with respect to representations to rating companies, it is pointed out:

> The fact that the rating company does not communicate the figures misstated by the maker of the misrepresentations is immaterial. It is enough that their substance is summarized with reasonable accuracy or that the rating given expresses the effect of the misstatements made.

(g) *The United States has a statutory cause of action.*—It is also contended (Br. in Opp., p. 23) that the right of action here is confined to the local municipalities, because a donor has no cause of action against a third party who defrauds a donee. The simple answer is that, even if the contractual relationship could be regarded as creating merely a donor-donee relationship, which we deny, this was not a completed gift and it is well-established that even under common law principles the action of deceit for fraud is not based on contractual relation and privity of the parties is not essential. Furthermore, since the cause of action here is purely statutory, the sole question is whether the facts bring the case within its operation.

4. *Imposition of a civil penalty after conviction does not constitute double jeopardy.*—The contention that respondents are being punished twice is without merit. In *Helvering* v. *Mitchell*, 303 U. S. 391, this Court overruled a similar contention based on a prior acquittal of a criminal charge of wilful attempt to evade or defeat the income tax. Upholding a civil action, under section 293(b) of the 1928 Revenue Act, to recover a 50 per cent penalty because of a deficiency due to fraud with intent to evade the tax, the Court said:

> That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. (P. 397.)
>
> Congress may impose both a criminal and a civil sanction in respect to the same act or omission: for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. (P. 399.)
>
> Remedial sanctions may be of varying types • • • Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil

> proceedings. * * * In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions. (Pp. 399-400.)
>
> The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud. In *Stockwell* v. *United States*, 13 Wall. 531, 547, 551, the Court said of a provision which added double the value of the goods: "It must therefore be considered as remedial, as providing indemnity for loss. And it is not the less so because the liability of the wrongdoer is measured by double the value of the goods received, concealed or purchased, instead of their single value." (P. 401.)
>
> That Congress provided a distinctly civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil, not a criminal sanction. (P. 402.)

That is the situation in the instant proceeding. Congress provided for two separate proceedings for the offenses alleged in the complaint. The one was purely a criminal sanction providing fine and imprisonment, and the other was a civil sanction providing for the recovery of damages and forfeiture.

3. *Consent of Commissioner or Attorney General is unnecessary.*—The final point made by respondents, that this suit required the consent or authorization of the Commissioner of Internal Revenue and the Attorney General is clearly without merit as is amply shown in the opinion of the circuit court of appeals, and it is unnecessary to add to the complete answer there made (R. 479-483).

CONCLUSION.

This cause involves the naked legal question of the liability of parties to the United States for fraudulent acts in connection with public contracts. Few subjects of the law are presently more important, and this subject is destined to become of eve greater importance in the future. Not only is the subject of importance as a matter of law, but it is one of importance in connection with public policy generally and as an incident to national defense. In these circumstances, few people will lightly condone judicial construction—such as that indulged by the court below—which emasculates a statute under circumstances and at a time when that very statute is intended to be applicable to the full. It is therefore respectfully submitted that the writ of certiorari should issue as prayed in the petition.

HOMER CUMMINGS,
CHARLES J. MARGIOTTI,
Counsel for Petitioner.

September 1942.

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No. 173

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, EX REL. MORRIS L. MARCUS, AND MORRIS L. MARCUS IN HIS OWN BEHALF,

Petitioners,

v.

WILLIAM F. HESS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER.

HOMER CUMMINGS,
WILLIAM STANLEY,
CHARLES J. MARGIOTTI,
Counsel for Petitioners.

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BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the district court denying motions for new trial and judgment n.o.v. (R. 346) is reported in 41 F. Supp. 197. The opinion of the circuit court of appeals (R. 471) is reported in 127 F. 2d 233.

Jurisdiction.

The judgment of the circuit court of appeals sought to be reviewed was entered on March 23, 1942 (R. 485). Petition for a writ of certiorari was filed June 23, 1942, and was granted October 12, 1942 (R. 546). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

Respondents, through admittedly collusive bidding, secured contracts to perform work on municipally sponsored PWA projects. Their contracts, work, and claims were supervised and approved by Federal officers. They were paid, through the municipalities, with funds obtained from the Public Works Administration. The broad question here is whether respondents are liable to the United States for double damages and penalties on account of their fraud, under one or more of the first three clauses of R. S. sec. 5438. A question is therefore presented under each clause as follows:

1. *Liability under first clause of statute.*—Whether, in a suit on behalf of the United States for damages and penalties, an admittedly fraudulent contractor's claim approved by a Federal officer and paid out of United States (PWA) funds is actionable under the first clause of R. S. sec. 5438 as a "claim upon or against the Government of the United States, or any department or officer thereof"?

2. *Liability under second clause.*—Whether the making and presentation by a defendant contractor of fraudulent claims and false certificates of non-collusive bidding, used by a municipality to aid it in obtaining payment of a grant to such municipality of United States (PWA) funds for the purpose of paying such contractor's claims, is not action-

able as against such contractor under the second clause of R. S. sec. 5438, which imposes liability upon "every person • • • who • • • makes, uses, or causes to be • • • used, any false • • • claim [or] certificate" for the purpose "of obtaining or aiding to obtain the payment or approval of" a claim against the United States?

3. *Liability under third clause.*—Whether the presentation of fraudulent contractors' claims addressed to the municipal sponsor of a PWA project for payment from federal PWA funds in the hands of such sponsor—all in furtherance of an admitted conspiracy—is not actionable under the third clause of R. S. 5438 which imposes liability upon any person who enters into "any agreement, combination, or conspiracy to defraud the Government of the United States" by obtaining the allowance of "any claim" whether against the United States or against a third party, where the effect is to defraud the United States?

Statutes Involved.

Revised Statutes, sec. 5438:

> Every person [1] who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the

payment or allowance of any false or fraudulent claim * * * shall be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars.

Revised Statutes sec. 3490:

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.[1]

Revised Statutes secs. 3491 and 3493, authorizing *qui tam* proceedings to enforce the liability imposed by R. S. sec. 3490, are printed in the Appendix.

Regulations under the PWA statutes also appear in the Appendix.

Statement.

On January 25, 1940, the petitioner on behalf of the United States and as well in his own behalf brought this action in the Western District of Pennsylvania against 52 defendants

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[1] Because R. S. sec. 3490 imposed liability only for acts in violation of the prohibitions specified in R. S. sec. 5438 in 1874—the date of the enactment of R. S. sec. 3490, the conduct and acts giving rise to a cause of action under R. S. sec. 3490 must be measured by the language of R. S. sec. 5438 as it originally read at the date of the enactment of R. S. sec. 3490 and not as later amended. *Olson* v. *Mellon*, 4 F. Supp. 947, aff'd 71 F. 2d 1021, cert. denied 293 U. S. 615.

While R. S. sec. 5438 was later amended (see 18 U. S. C. secs. 80, 83) the scope of R. S. sec. 3490 which incorporated it in the year 1874 remains intact and unaffected. *Kendall* v. *United States*, 12 Pet. 524, 625; *In re Heath*, 144 U. S. 92, 93, 94.

to recover the penalties and double damages, provided by R. S. sec. 3490, resulting from acts in furtherance of a conspiracy by defendants to defraud the United States in violation of R. S. sec. 5438.

The complaint charged that grants of money were made by the United States, through the Public Works Administration, to aid in the construction of numerous projects by municipalities and school districts (referred to as "sponsors") in and about the City of Pittsburgh (R. 10); that such sponsors advertised for bids for contracts for the performance of the electrical work involved in such projects (R. 10-11); and that the defendants, all members of the Electrical Contractors Association of Pittsburgh, Inc., thereupon conspired to defraud the United States (R. 11). It alleged that, in furtherance of, and pursuant to, the conspiracy, they engaged in sham and collusive bidding, falsely and fraudulently submitted bids, received awards and entered into contracts, submitted false and fraudulent claims for payment thereof, made false and fraudulent statements, and made false and fraudulent certificates knowing them to contain fraudulent or fictitious statements or entries (R. 14). The answer of defendants denied substantially all the allegations of the complaint (R. 33, 34, 35).

After a lengthy trial, the jury returned a verdict against all the defendants save one in the sum of $315,100.91, being $203,100.91 damages and $112,000 penalties (R. 338). Judgment was entered accordingly (R. 389). On motion for new trial (R. 341-346) the court entered an opinion and order overruling the motion (R. 346, 387). The circuit court of appeals, however, held that the statute authorizes recovery only when the defendants present a direct "claim upon or against the government of the United States or any department or officer thereof" (R. 475), and that the evidence failed to show that the defendants had made or presented

such a claim (R. 479). It entered judgment of reversal accordingly (R. 485).

The Facts.—As to each of the projects here involved, with unimportant variations, the evidence showed that the sponsor—that is, the municipality or school district—made application to the Federal Emergency Administration of Public Works for a grant (R. 82, 537; 44 C. F. R. 216.2-216.3[2]). An estimate of cost of the project, detailed according to each branch of the work, viz. general construction, heating, plumbing and electrical, was submitted on PWA Form 231 (R. 498). The grant was in each case made on what PWA approved as the proper estimate of the cost of the project (R. 498-499, 500). The Public Works Administration addressed a formal offer to the sponsor incorporating the standard terms and conditions of PWA Form 230 (R. 157-179) by reference (R. 179-180, 497-498), and the latter by its acceptance created the Finance Agreement between the Government and the municipality (R. 116-117, 181-184; 44 C. F. R. 222.1).

The grant or agreement of the Public Works Administration was to pay 45% of the actual cost of the project but not in excess of a specified sum representing 45% of the estimated cost (R. 45, 88-89, 179).[3]

[2] The President, under the authority of Section 201(a) of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 200, delegated to the Federal Emergency Administrator of Public Works authority to prescribe rules and regulations (Executive Orders Nos. 6252, August 19, 1933, and 6929, December 26, 1934, 44 C. F. R. 201.1, 201.2 and 201.4). The regulations are collected in Title 44, Ch. II, of the Code of Federal Regulations. Those which are particularly pertinent are reprinted in the Appendix, *infra*.

[3] Of the 48 projects as to which the plaintiff claimed damages at the close of the trial, only two involved 30% limitation of the federal grant (R. 331). The Act of June 16, 1933, c. 90, Tit. II, Sec. 203 (a), 48 Stat. 195, 202, provided that "no such grant shall be in excess of 30 percentum of the cost of the labor and materials employed upon such project." The Work Relief and Public Works Appropriation Act of 1938, Joint Resolution of June 21, 1938, c. 554, Sec. 201 (d), 52 Stat. 809, 816, provided that "no grant shall be made in excess of 45 percentum of the cost of any non-Federal project."

After execution of the Finance Agreement between the Public Works Administration and the local municipality, the latter advertised for bids on the work (R. 43-44, 217). Each advertisement disclosed that the work was a Public Works Administration project (R. 43-44, 217). Attached to the successful bids of the defendant-contractors on substantially all projects involved herein were signed statements or certificates of non-collusive bidding (R. 225-226).[4] The contract documents, which included the certificatess of non-collusive bidding (R. 217, 225-226), were required to be, and were, submitted to PWA officers for approval (PWA Form 230, R. 165, 217, 495, 502).

Collusion in bidding.—As stated in the opinion of the circuit court of appeals (R. 472):

> The facts are not in dispute and may be simply stated. * * * The appellants, the officers and members of the Electrical Contractors Association of Pittsburgh, conspired to rig the bidding on these projects. The pattern of the collusion was the informal and private averaging of the prospective bid which might have been submitted by each appellant. An appellant chosen by the others would then submit a bid for the average amount and the others all submitted higher estimates. The government was thereby defrauded in that it was compelled to contribute more for the electric work on the projects than it would have been required to pay had there been free competition in the open market.

Thus both courts below recognized the collusion in bidding and the consequent fraud upon the United States.

The collusion and conspiracy to control bidding on PWA projects by the respondents and the Electrical Contractors'

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[4] Examination of the original exhibits certified to this Court by the clerk of the Circuit Court of Appeals indicates that of the 56 contracts involved, 48 were based on certificates or affidavits of non-collusion and five were without certificate of non-collusion. The contracts on the remaining three projects have not been forwarded to this Court.

Association of Pittsburgh, Inc., started in June, 1935. Two plans were devised. The first plan for controlling the bids was the so-called "Average Bid System". The members bidding on a project met before the bid opening date, compared their figures, and submitted the figures to Robert C. Carmack, who had been employed by the Association as its manager (Tr. 896-900).[5] Mr. Carmack received his instructions and orders from the President of the Association (Tr. 1160). Carmack would average the figures submitted to him, which would include the labor and material, job expenses, and other items of cost. If a bid was extremely low or high it would be thrown out and not used in the average (Tr. 902). After an average was struck, over-head and profit were added, depending upon the size of the job (Tr. 898). On jobs up to $20,000.00 a mark up of 20% over-head and 10% profit were added; on jobs over $20,000.00 the mark-up was 15% for the over-head and 10% for profit (Tr. 985-986, 990). This mark-up was added regardless of the over-head of any particular contractor (Tr. 1067). The member closest to the average bid was selected by the members to submit the successful bid. The other members would be assigned higher figures to submit as bids in order to protect the member selected for the successful bid (Tr. 899). This system continued for five or six months. Dissatisfaction arose amongst the members because some members struck the average too consistently and others were not getting any work (Tr. 900).

Another plan was then devised so that the work could be distributed more evenly. This second plan was the same as the first that is, by averaging the bids. However, the work was allocated according to volume. Under this plan,

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[5] References to "Tr." are to the portions of the original record constituting the record on appeal in the Circuit Court of Appeals and certified here by the clerk of that court, but not printed pursuant to stipulation of counsel (R. 546).

the members of the association were classified into four categories or brackets according to size and capacity to handle business: (1) Up to $3500; (2) $3500 to $15,000; (3) $15,000 to $40,000; (4) $40,000 and up. They bid in their respective classes (R. 900-901).

Under this second plan, if a job came within a certain bracket, the members within that bracket would submit their estimates to Carmack either by taking them to him or by telephone. Upon receipt of these estimates, Carmack would average them and then would consult the volume book (Exhibit 537), which contained the volume of business of each member of the Association (R. 919-920). By consulting the volume book, Carmack determined which contractor in that bracket had the least business. After determining the bid just as in the first plan, *supra*, the member lowest in volume in that bracket would be selected to submit the successful bid regardless of whether he had submitted a higher or a lower figure to Carmack (Tr. 903). The others would be given higher figures to submit as bids to the sponsors. These figures were given either verbally or on a small slip of paper (Exhibit 467A, Tr. 904-905).

As to the highest bracket, however, the members made their own decisions and prices. At the beginning of the plan they were handled in the same way as the others. However, they later effected their own plan. They met at various places and each member would bring in an estimate at a meeting. At a round table discussion, they would decide amongst themselves who was to get the contract and at what price. Although they handled the jobs themselves, Carmack attended the meetings once in a while and he would be given figures to submit to members outside of this large bracket (Tr. 1003).

This plan of collusion was used not only on PWA projects but on all jobs—private homes, churches, etc. (Tr. 911, 1166).

The members were compelled to pay monthly dues based on their monthly volume of business. In 1935, the amount of dues was ½ or ¾%; on April 1, 1936, the dues were raised to 1½% (Tr. 971-973). The dues were included in job expenses as part of the cost of the job. In other words, they were hidden in that item (Tr. 1142-1144, 1146).

The yearly volume of business done on the bidding plan of the Association was $1,500,000.00 (Tr. 1165).

If a member did not comply with the bidding plan, that is, if he bid independently of the other members, he was given a volume penalty. In other words, the volume of the amount of the job would be doubled against him which would slow him up in getting another job according to volume (Tr. 1234, 1313-1314).

Claims by the contractors.—As the work progressed in the cases here involved, the defendant-contractors were obliged to submit "Periodical Estimates for Partial Payment", PWA Form I-23 (R. 190, 202), for approval by the PWA Resident Engineer Inspector in order to obtain partial payment for the work performed during the preceding month.[6] Such estimates, and their approval by the PWA representative, were required by the Regulations (44 C. F. R. 237.8, 237.13), by the Finance Agreement of the sponsor with the Government (PWA Form 230, R. 174, 175-176), and by the terms of each contract (R. 119, 232, 234, 48, 59, 61-62, 64, 66, 112, 521, 536). Thereafter, the estimate was turned over to the sponsor for payment from the Construction Account (R. 41, 48, 64).

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[6] It may be noted that this PWA Form I-23, used for all claims submitted by the contractors, called special attention to the fact that claims against the United States were involved, by citing federal statutes punishing presentation of false claims against the United States (R. 190, 191; 202, 204).

The Construction Account.—The Finance Agreement of the United States with the municipality in each case provided, Part II, Par. 5 (R. 163):

> A separate account or accounts (herein collectively referred to as the "Construction Account") will be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation. The advance grant payment, * * * Applicant's Funds [by definition the Applicant's share of the cost of the Project (R. 162)], the final grant payment and any other monies which shall be required in addition to the foregoing to pay the cost of constructing the Project will be deposited in the Construction Account promptly upon the receipt thereof. * * * Payments for the construction of the Project will be made only from the Construction Account.

The finance agreement also provided, Part II, Par. 6 (R. 163):

> Monies in the Construction Account will be expended only for such purposes as shall have been previously specified in a signed certificate of purposes filed with and accepted by the government.

The same agreement also provided, Part II, Par. 1 (R. 161):

> If the Project to aid in the financing of which the government has made an advance grant, is abandoned, the unused advance grant proceeds will be returned to the government, but nothing herein shall be construed to waive any right which the government may have to the return of the entire advance grant if the applicant shall have acted in bad faith or made any misrepresentations concerning the completion of the Project or the use of the advance grant.

As pointed out above, under this agreement the municipality could properly make no payments to the contractors from the special Construction Account until the contrac-

tors' Periodical Estimates for Partial Payment had been duly certified by the officials of the municipality and approved by the PWA representative (PWA Form 230, R. 174, 175-176; R. 119, 48, 59, 61-62, 64, 66, 521, 536).

Requisitions by the municipalities.—Pursuant to the Regulations (44 C. F. R. 230.21-230.25), the Finance Agreement between the United States and the municipality provided that the government would pay for deposit in the specially established Construction Account 15% of the previously estimated cost on advance requisition by the sponsor after acceptance of the Government's offer, 10% upon a first intermediate requisition when the sponsor had deposited its share in the same account, 10% upon a second intermediate requisition submissible when the project was 50% completed and payable when the project was 70% completed, and 10% upon final requisition after completion of the project and final audit, but not in excess of 45% of the actual cost of the project "as determined by the Administrator" (PWA Form 230, R. 157, 160-163).

The requisitions or claims of the municipalities were required to be supported by the claims of the contractors, as "documents necessary to support such requisitions" (R. 162, 163). 44 C. F. R. 230.21. The terms and conditions of the Finance Agreement provided that the sponsor would require of the contractor and submit to the PWA representative, on forms supplied by the Government, "Periodical Estimates for Partial Payment" (R. 174). These periodical estimates were on the PWA Form I-23 above referred to, upon which the contractor in each instance made his monthly claim for payment (R. 202-207). When grant requisitions upon the United States were made by the sponsor, these monthly estimates were part of, and included in, the records audited by the PWA in determining how much of

the sponsor's requisition or claim against the United States was to be paid (R. 505-507, 528).[7]

Decision of the district court.—The trial court instructed the jury that there had been evidence of excessive contract prices for electrical work on 48 projects (R. 142-144) and submitted to the jury petitioners' tabulation of damages on these projects (R. 146, 331). In addition, the court instructed that there was evidence of collusion, without showing of actual damage on eight other projects, on each of which as in the case of the 48, a penalty of $2,000 was applicable (R. 144). The jury returned a verdict of $263,100.91 damages and $112,000 penalties (R. 338).

In its opinion overruling the motion for new trial, the trial court pointed out that there was in each case evidence as to two types of payments, each based on a particular type of claim, showing: (1) that the granted money was transferred from the United States Treasury to be deposited in the joint Construction Account only upon allowance of requisitions by the municipalities based on the

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[7] PWA auditors examined and audited the accounts and all costs pertaining to each project before each disbursement of moneys by the PWA under the grant, in order to determine items of cost proper to be included in computing the amount of the grant earned by the sponsor under its Finance Agreement (R. 53, 107, 522, 528, 529; 44 C. F. R. 202.22, 230.1, 230.2). And the regulations specified that, in reviewing the sponsor's requisition, the Regional Director should "compare the financial entries on the requisition with the project audit made by the division of accounts" (44 C. F. R. 230.24).

That the certificate of non-collusive bidding in the defendant's bid was regarded as material part of the documents considered in passing on the question of payment by the United States under the grant in each case is shown by the reconciliation sheet included in the part of the record brought here, for it shows a suspension of the claim of the City of McKeesport based on the contract of one of the defendants because of the alleged collusive bidding (R. 211, 215, 533). To increase the safeguard created by the contractors' assertion of non-collusion, the government later demanded that affidavits—rather than mere certificates of non-collusion—be furnished by the contractors (Tr. 427).

estimates submitted by the contractors to the sponsor and by it in turn submitted as supporting documents for its requisition on the Public Works Administration; and (2) that no payments could be made by the sponsor from federal funds in the Construction Account to the contractor without approval by the local PWA representative of the estimates submitted monthly by the contractor. The court said (R. 349):

> The money the Government agreed to contribute to these projects was paid out in the course of the carrying-out of these projects only on sworn estimates submitted by the contractor to the Administrator, and approved by him on Federal Form (1-23). The Federal funds allotted to each project were placed in a bank approved by the Administrator, which bank account contained also the funds of the local authority. This special fund was from time to time checked by a representative of the Administrator; and no payments could be made therefrom to the contractor doing the work, except with the approval of the Administrator, which approval was noted on Form I-23 above mentioned.

Decision of the circuit court of appeals.—The circuit court of appeals, although it recognized that "the government was • • • defrauded in that it was compelled to contribute more for the electric work on the projects than it would have been required to pay had there been free competition" (R. 472), reversed on the ground that (R. 475, 479):

> The statutory language here important authorizes recovery only where the defendants presented a "claim upon or against the government of the United States or any department or officer thereof." • • •
>
> The claims of the defendants • • • were simply against the local municipalities. Since the defendants

had no claim upon or against the United States, this action was not authorized by the informer statutes.

Specification of Errors.

The circuit court of appeals erred:

1. In holding that a right of recovery was not established under the first clause of R. S. sec. 5438 which makes liable "every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent."

2. In holding that the only statutory language important in the case is that of the first clause of R. S. sec. 5438.

3. In failing to hold that a right of recovery was established under the second clause of R. S. sec. 5438 which makes liable "every person * * * who, for the purpose of obtaining or aiding to obtain the payment or approval of [any claim upon or aaginst the Government of the United States] makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry."

4. In failing to hold that a right of recovery was established under the third clause of R. S. sec. 5438 which makes liable "every person * * * who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim."

5. In reversing the judgment of the district court.

Summary of Argument.

Revised Statutes sec. 3490 creates a right in the United States to recover double damages plus $2,000 penalty for each violation of R. S. sec. 5438. (Under R. S. secs. 3491, 3493, such suit therefor may be brought by any person as well for himself as for the United States, whereupon he becomes entitled to receive one-half the amount of damages and penalties recovered.)

1. Revised Statutes sec. 5438 prohibits the presentation for payment or approval to any person or officer in the service of the United States of a claim against the United States which is false, fictitious or fraudulent. The evidence in this case shows that respondents presented or caused to be presented to PWA officers periodic estimates, or claims for payment on their contracts with municipalities which had received grants-in-aid from the United States. These claims were in actual effect against the government of the United States because federal funds in the hands of each municipality were ear-marked as special funds held in trust for a specific purpose in a separate account and the approval of the federal officers was the last step necessary to obtain their release to the defendants. *Madden* v. *United States*, 80 F. (2) 672; *Roberts* v. *Calhoun County, Fla.*, 45 F. Supp. 291. The evidence further shows that the claims of the respondents were by them known to be fraudulent because they were based on contracts with municipalities for electrical work at prices and rates which were excessive as the result of continuous fraud incident to (1) concealment of a secret combination of substantially all electrical contractors in the Pittsburgh area, and (2) affirmative representations to each municipality of non-collusion.

2. The second clause of R. S. sec. 5438 is addressed, not to presentation of a fraudulent claim directly against the

United States but imposes sanctions against anyone who, for the purpose of aiding to obtain the payment or approval of a claim against the United States, "makes, uses, or causes to be made or used, any false bill * * * account, claim, certificate [or] affidavit * * * knowing the same to contain any fraudulent or fictitious statement or entry". Here it clearly appears that the municipalities for whom defendants contracted to perform work presented to the United States claims for payment which were, of necessity, based on defendants' claims for partial payment and certificates of non-collusion in bidding which they filed with the municipalities in connection with substantially all projects here involved. The defendants' periodic estimates or I-23 claims for progress or advance payments contained fraudulent representations in that they averred that work had been performed in accordance with the terms and conditions of the contract with the particular municipality. The fraud lay in the fact that bids were by the terms of the contract required to disclose all parties in interest with the bidder whereas defendants concealed the interests of their coconspirators in having the particular contract let at the excessive price fixed by the collusive bid in each case. Furthermore, the defendants' certificates of non-collusion filed by both the successful and unsuccessful bidders aided in obtaining the claim of the municipalities against the United States because they were relied upon by the examining and auditing officers of the United States in determining the amounts of further advances upon the requisitions of the several municipalities.

Under the second clause of R. S. sec. 5438 it is not essential that the formal documents of claim of the municipalities against the United States in this case be shown to be fraudulent. *Edgington* v. *United States*, 164 U. S. 361; *United States* v. *Jones*, 32 Fed. 482; but even if the statute were to be so construed, it is plain that the otherwise innocent

claims of the municipalities nevertheless included and relied upon the fraudulent estimates and certificates of noncollusion of the defendants and were, therefore, in that sense fraudulent, too. *Evans* v. *United States*, 11 F. (2d) 37. Since this was the natural result of their making of fraudulent claims, accounts, certificates and affidavits, the defendants are properly to be held to have made and used them "for the purpose of * * * aiding to obtain the payment" of the claim of the municipality against the United States. *United States* v. *Patten*, 226 U. S. 525.

3. Finally, conspiracy to defraud the United States by obtaining or aiding to obtain the payment or approval of any false or fraudulent claim—whether against the United States or another—falls within the ambit of the third clause of R. S. sec. 5438. Conspiracy by the defendants is conceded and the defrauding of the United States as a result is acknowledged by the circuit court of appeals. It is apparent that the means by which this was accomplished must be found either in the defendants' obtaining approval and payment of their fraudulent monthly I-23 claims by the local PWA resident engineer, or in the defendants' aiding the municipalities to obtain payment of their claims against the United States by fraudulent entries in defendants' I-23 claims and non-collusion certificates. On the evidence the verdict and judgment can be sustained on either ground under this third clause of the statute.

Argument.

Revised Statutes sec. 5438 standing alone is merely a criminal statute. But R. S. sec. 3490 incorporates it and creates in the United States a right to recover double the amount of damages for pecuniary or property loss suffered by reason of fraud in violation of R. S. sec. 5438, together with a civil penalty of $2,000 for each such violation. Origi-

nally adopted in 1863 when frauds against the Government were prevalent in connection with Civil War contracts, one of its objectives obviously was to reimburse the Government for the heavy expense of investigation as well as for the loss directly resulting from the fraud.* Cf. *Stockwell* v. *United States*, 13 Wall. 531, 547, 551; *Helvering* v. *Mitchell*, 303 U. S. 391, 401. No other federal statute thus adequately protects the United States by permitting recovery of double damages. Hence, the suggestion of the circuit court of appeals that the United States or the municipality in each case may bring suit for simple damage on account of fraud and be made "completely whole" (R. 479) ignores Congressional policy, deprives the United States of a right of recovery sufficient to include the expense of investigation and litigation, abolishes a civil penalty, and nullifies the purpose of the statute.

The portions of R. S., sec. 5438, here relevant are the first three clauses proscribing three distinct offenses with reference, respectively, to "every person"—

> [1] who makes or causes to be made or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or
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> [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or

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* Revised Statutes sec. 5438 was derived from the Act of March 2, 1863, c. 67, secs. 1 and 3, 12 Stat. 696, 698; and R. S. sec. 3490 was derived from section 3 of the same act. In the respects here pertinent they are substantially identical with the language of their precursor. R. S. sec. 3490 is now inaccurately codified as 31 U. S. C. sec. 231.

> [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim.

But the circuit court of appeals ignored the second and third clauses of the statute altogether, and treated the statute as though it consisted solely of the first clause, saying (R. 475):

> The statutory language herein important authorizes recovery only where the defendants presented a "claim upon or against the government of the United States or officer thereof."

By narrow and erroneous construction of this language of the first clause it held that no acts in violation of that clause had been established. In thus narrowly construing the first clause, and in thus entirely disregarding the second and third clauses, the court below has defeated the plain intention of Congress.

I.

The Claims of the Contractor on Each Project Were Claims Against the United States and Violated the First Clause of R. S. Sec. 5438.

The first clause of the statute, *supra*, contains three elements: (1) presentation of a claim for approval to "any person or officer in the service * * * of the United States", (2) which is a "claim upon or against the government of the United States" and (3) which is presented with knowledge that it is "false, fictitious, or fraudulent". By the acts of each contractor here in presenting his periodical estimates for payment (Form No. I-23; R. 190, 202) he brought himself within all three of these requirements of the first clause of the statute, as follows:

(1) It was not seriously questioned that the contractor in each case became, in the words of the statute, "one who

• • • presents or causes to be presented, for payment or approval, to or by any person or officer in the • • • service of the United States" a claim. PWA Form I-23 on which the contractor's claims were made in each case was headed "Federal Emergency Administration of Public Works" and entitled "Periodic Estimate for Partial Payment" (Ex. 107, R. 190-194; Ex. 245, R. 202-207). Each form I-23 contained a blank form of approval for signature by the Public Works Administration Engineer in Charge (R. 193-194, 207). This approval by a Federal officer was required by the regulations (44 C. F. R. 237.8, 237.13) and by the finance agreement of the municipality with the government (R. 174, 175-176). And in each case the form I-23 claim, when submitted by the contractor, was either presented or thus caused to be presented to the PWA Engineer Inspector for approval (R. 48, 66, 112, 537-538).

(2) The claim in each case was, in the words of the statute, a "claim upon or against the government of the United States." The claim was for payment out of monies in a trust fund in which the United States retained a property interest. The whole administrative procedure throughout displays the utmost solicitude that the moneys allocated by the United States should reach their intended destination and that the United States should not be defrauded in the exercise of its power to thus appropriate for the general welfare. As shown in the statement of facts above, the grant in each case was made by the United States only upon what PWA approved as the proper estimate of the cost of the project (R. 498-499, 500). The plans and specifications, prepared by the sponsors through their architects and engineers, were required to be and were submitted to PWA for approval (R. 530, 535-536, 537-538). The sponsor in advertising for bids plainly stated that a PWA project was involved (R. 217, 225). The grant payments by PWA were placed in a special, ear-marked Construction Account to-

gether with funds of the sponsors, and were subject to use solely for the construction of the particular project under the terms and conditions of the contract between PWA and the sponsor (R. 55-56, 61-62, 64, 89, 97, 99-100, 107, 509, 525). All plans and specifications, contract documents, performance of work, construction accounts, payrolls, and payments of money were supervised, regulated, and approved by PWA (R. 51, 74, 79, 80, 86, 111, 495, 502, 503, 529, 531, 535-536, 537-538).[9]

Thus the United States surrendered neither control over nor interest in the funds. All courts which have had to deal with related questions have recognized that, in the case of

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[9] In addition to the record here, the nature of the transaction has been set forth by the Secretary of the Treasury in an elaborate report—pursuant to Sen. Res. No. 150, 76th Cong., 1st Sess., 84 Cong. Rec. 7954-7955, respecting the financial operations of federal lending and spending agencies—of which the following excerpts are here pertinent (Sen. Doc. No. 172, 76th Cong., 3d Sess., v. 26, pt. 1, February 15, 1940):

> "Disbursement of funds is made by the Public Works Administration only after approval of a certificate of purposes setting forth the proposed use of the funds." (P. 274.) "A properly certified voucher is issued for each disbursement, after the project costs have been audited at the site of such project and such costs found to be in accord with the terms of the contractual arrangement. * * * The determination of loan and grant payments * * * requires that the Government have complete knowledge of all costs incurred for each project. * * * The scope of the audits includes an examination of all basic records supporting costs incurred in connection with each project * * * Among the important features covered by these audits are the determination of whether or not loan and grant funds are being expended in accordance with previously approved estimates, whether there has been compliance with Public Works Administration terms, conditions, and requirements, and the identification of any expenditures which may have been improperly made from the project funds or which may not be eligible for participation in the grant." (P. 275.) "All disbursements, other than administrative expense, are based upon contractual arrangements which have been checked and approved. The vouchers are thoroughly checked to ascertain if payments are correct, and the amount paid is dependent upon the result of an audit made at the site of the work and specific clearance by all interested divisions of the Public Works Administration. Only after that is it certified to the disbursing officer for payment." (P. 276.)

Federal grants in aid, the United States has retained an interest in the moneys.[10] In *Madden* v. *United States*, 80 F. (2d) 672 (C. C. A. 1), cert. denied 297 U. S. 710, the court said (p. 676):

> Defendant contends that there was a fatal variance between the proof and the indictment. His argument is that funds granted by the Federal Emergency Relief Administration to the Emergency Finance Board, a state agency, became state funds and thereafter no title thereto existed in any federal agency and when the Emergency Finance Board transferred part of its funds to the City of Boston for payment of Boston Public Library employees, title to such funds passed to the City of Boston, and thereafter the power of disposition of such funds was in the City of Boston and no Federal agency had any power over them. This contention is not sound. All projects carried on with money derived from the federal government had to be approved by the Federal Administrator. Any diversion of such funds from the project to which they were assigned was a diversion of government money. As hereinbefore stated, all funds allotted by the Federal goverment for the relief of unemployment even though disbursed by state agencies were earmarked as federal funds, and if diverted from the use for which they were granted it constituted a fraud upon the government.

In *Langer* v. *United States*, 76 F. (2d) 817 (C. C. A. 8), the court said (p. 823):

> Appellants next contend that the indictment charges no offense because if the money were money of the United States prior to its being turned over to North Dakota officials, it then ceased to be such, and appel-

[10] The respondents in their brief in opposition to the petition for certiorari (p. 23) appear to view this agreement as a gift. While in a lay sense the municipality might be regarded as a donee, it is manifest that the terms of this arrangement recognize the engagements of the municipality as the consideration for the obligation of the United States to make the promised advances to the municipality and to permit them to be paid out by it.

lants could not obstruct nor defeat the administration of the federal statutes because they were administering funds belonging to the state, and were not federal officials. In this connection it is urged that it was the intent to pass full and complete title to the money when the Reconstruction Finance Corporation, or the Administrator under the Federal Emergency Relief Act of 1933, loaned it to the state, or otherwise devoted it to the use of the state. Whether the money is granted or loaned by the Reconstruction Finance Corporation or the Administrator under the Federal Relief Act of 1933, it is money of the Reconstruction Finance Corporation.

See to the same effect *United States* v. *Harding*, 65 App. D. C. 161, 81 F. (2d) 563, 568. Whatever may have been the precise legal relation in those cases, in the present case it is clear that the United States definitely retained a property interest in the funds delivered to the municipalities until they were paid out to the claiming contractors. The chose in action of the municipality against the bank represented by the Construction Account became the trust res at least insofar as it included the funds transferred by the United States. The municipality, of course, was trustee.

As pointed out above, all payments made by the United States to the municipality were required to be "deposited in the Construction Account promptly upon the receipt thereof. * * * Payments for the construction of the Project will be made only from the Construction Account" (R. 163). Intent that the United States retain an interest in the special fund also appears from the provision (R. 161):

> If the project to aid in the financing of which the Government has made an advance grant is abandoned, the unused advance grant proceeds will be returned to the government.

Plainly, this is not the language of debtor and creditor. Rather it indicates recognition of continuing interest in the proceeds of the specific account.

Further, in accordance with the Regulations (44 C. F. R. 222.21) the Finance Agreement provided:

> Monies in the Construction Account will be expended only for such purposes as shall have been previously specified in a signed certificate of purposes filed with and accepted by the Government (R. 163).

The municipality was required to make monthly payments to each construction contractor—

> on the basis of a duly certified and approved estimate of the work performed during the preceding calendar month (R. 176).

The required approval was in each instance given by the PWA Resident Engineer Inspector, as shown above.

It is thus apparent that, from the moment they were received, the municipality held the Government funds for the special purpose and under the duty to use them, not for its general requirements, but only to pay the claims of contractors and others for work on the project and those only if and when they had been approved by the Resident Engineer Inspector of the PWA. To the extent that monies received from the United States were not needed for that purpose, there was a duty to return them to the United States unless outstanding bonds were at the date of completion held by the United States, in which case the Finance Agreement directed specifically that the unused balance be used to repurchase bonds or placed in the bond fund (R. 163-164).

It seems plain that the United States retained an equitable property interest in the Construction Account and that the municipality held title thereto as a trustee.

McKee v. *Laimon*, 159 U. S. 317, 322; *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 206 Fed. 663, 665; *Roberts* v. *Calhoun County, Fla.*, 45 F. Supp. 291, 293. In submitting its monthly claim for allowance by the PWA Resident Engineer Inspector, therefore, the defendant contractor in each instance knew that it was by this action inducing the last step necessary to complete the relinquishment by the United States of its control over its moneys on deposit in the Construction Account. This is all that any claim against the United States can do.

It is not necessary that the claim be formally addressed to the United States. A claim is just as clearly a claim against the United States when submitted for approval to an officer of the United States, so long as it involves a claim against, or in derogation of, the pecuniary or property right of the United States. See *United States* v. *Mercur Corporation*, 83 F. (2d) 178, cert. denied 299 U. S. 576.

(3) The claims of the contractors on their Form I-23 estimates were made by them "knowing such claim to be false, fictitious, or fraudulent" within the meaning of the first clause of the statute. There is plainly no merit in the attenuated theory that the fraud of the respondents ended in each case with the obtaining of the contract and that the subsequent periodic claims, because they were strictly in accordance with the then secured and existing written contracts, were not fraudulent. (See Resps' Br. in Opp. to Petition, p. 22.)

The initial fraud in the inducement of the contract lies in the implied representations that each bidder is acting in competition and not in combination with the others, *Hyer* v. *Richmond Ttaction Company*, 168 U. S. 471, 477 and that the sum bid is not in truth an unreasonable sum for the work to be done. *McMullen* v. *Hoffman*, 174 U. S.

639, 647. The applicable rule is set forth in 3 Restatement, Torts, sec. 535:

> One who deals with another in a business transaction or induces another to deal with a third person knowing that the other is relying upon the maker's misrepresentation previously made to induce the other to act in another and earlier transaction is subject to the same liability as though the maker had repeated the representation for the purpose of influencing the recipient's conduct in the later transaction.

In *United States* v. *Coggin*, 3 Fed. 492 (C. C. E. D. Wis.) the defendant, indicted under R. S. sec. 5438, contended that, while his initial procuring of a government pension certificate was by fraudulent affidavit, nevertheless prosecution for that fraud was barred by the statute of limitations and the subsequent collection of pension moneys under this genuine certificate involved no fraud. Rejecting this contention, almost identical with that advanced by respondents, the court said (p. 495):

> In this case it was not the entry upon the pension roll, nor the certificate issued, that was false or fraudulent. That was all genuine and authentic. The certificate issued was a genuine, true certificate, declaring that the defendant was entitled to a pension, but the claim was fraudulent. That certificate had been obtained, according to the indictment, by fraud, and when it was presented, as the indictment alleges it was, to the pension agent at Milwaukee, it constituted a false and fraudulent claim against the United States, and upon that false and fraudulent claim he obtained money, although the certificate was genuine.

It seems plain here that the fraudulent intent and acts of the respondents were directed, not so much at the mere obtaining of a contract with the United States—that was but an incident—but rather were directed to obtaining pay-

ment of claims in an amount determined at an excessive figure as a direct result of their fraud. Cf. *United States* v. *Newton*, 48 Fed. 218, 220-221. Pertinent here is the holding of the Circuit Court of Appeals for the Ninth Circuit in applying this same statute in *Dimmick* v. *United States*, 116 Fed. 825, 828:

> The character of the claim—that is to say, whether true, genuine, and honest, or false, fictitious, and fraudulent—must be determined in view of all of the facts and circumstances attending it. If it be originally forged, or otherwise fraudulently concocted, its presentation for payment with knowledge of the facts must necessarily be fictitious and fraudulent.

Manifestly fraud and misrepresentation may induce not merely the formation of a contract but also some performance under it. 2 Restatement, Contracts, sec. 476, *com. a.* Under established principles, therefore, it seems clear that the claims made for payment under the contract were, equally with the means by which the contract itself was obtained, stamped with fraud.

Since all three elements of the first clause of R. S. sec. 5438 are established by the evidence to have been present in this case, the court below erred in holding that no violation of that clause of R. S. sec. 5438 was shown.

II.

The Evidence Clearly Required a Verdict for the Plaintiff under the Second Clause of the Statute.

The provisions of R. S. sec. 5438 evince an intention on the part of Congress to protect the United States against pecuniary loss by fraud, no matter how indirect the cause. The first clause relates to the presentation of a "claim upon or against the Government of the United States, or any de-

partment or officer thereof, knowing such claim to be false, fictitious or fraudulent". The second clause, however, relates to anyone who, (a) for the purpose of "*aiding to obtain*" the payment or approval of (b) a claim against the United States or any department or officer thereof, (c) "makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement on entry."

Thus, plainly in this second clause Congress intended to reach not the direct presentation of a fraudulent claim against the United States covered by the first clause, but rather a separate and distinct offense: The making or causing to be used of a false claim, certificate, or affidavit—whether or not in itself it be a "claim against the United States"—if such claim, certificate, or affidavit be "for the purpose of obtaining or *aiding to obtain* the payment or approval of a claim against the United States" by another—in this case the municipality. *United States* v. *Coggin*, 3 Fed. 492, 495; and see *United States* v. *Strobach*, 48 Fed. 902, 909.

Acts by defendants in violation of the second clause of R. S. sec. 5438 were clearly established. The evidence showed that, in furtherance of the conspiracy, claims and certificates were made to the municipalities and thus caused to be used in turn by the municipalities in aid and support of the latters' claims against the United States for payment under the federal grants, as follows:

(1) Each of the "periodical estimates for partial payment" submitted by the several defendants on PWA Form I-23 clearly was a "false bill * * * voucher, account [or] claim" known by the claimant to contain a "fraudulent * * * statement or entry".

(2) Also, each of the certificates of non-collusion attached to bids on substantially all the projects was, within the meaning of the second clause, a "false certificate" known by the contractor to contain a "fraudulent or fictitious statement or entry".

Both the false "claim" and false "certificates" were made by the defendants and caused by them to be used by the municipalities in turn, within the meaning of the second clause, "for the purpose of obtaining or aiding to obtain the payment or approval of" claims upon the Government of the United States by the municipality in each case. The municipalities, of course, were but the innocent conduits of the fraud of the defendants.

The municipality in each case—upon the contractors' certificates and claims—made requisitions upon the United States for moneys to be deposited in the Construction Account (R. 160-162). There surely can be no denial that these requisitions were claims against the United States. And it is equally clear that these requisitions were, within the meaning of the statute, "aided" by the "certificates" and "claims" (Form I-23) of the contractors. Similarly in the words of the statute, each defendant was one who "causes to be * * * used" such certificates and claims. The violation of the second clause may be traced in detail as follows:

1. *The defendants' fraudulent and fictitious Form I-23 certificates aided the obtaining of the municipalities' claims against the United States.*—The requisitions were, it may be repeated, based on work done in part by the defendant contractor on each project. In determining what portion of the amount claimed in the requisition of the municipality should be paid, auditors for the PWA audited the accounts of the municipality pertaining to the project and, in so doing, reviewed and took into account the contractors' fraud-

ulent Form I-23 monthly estimates or claims for payment as part of the basis of the claim of the municipality against the United States (44 C. F. R. 202.22; R. 53, 107, 505, 505-506, 507, 522, 528, 529). The audit in each case showed the monthly estimates of the contractors (R. 53) and, under the regulations, was also used by the Regional Director in passing on the financial entries in the requisition of the sponsoring municipality (44 C. F. R. 230.24). By the same regulation it was provided that the Executive Officer in Washington in making a final review was to make a check against "all pertinent project records", which obviously would include in each case the original contract with its false certificate of non-collusive bidding.[11]

The Form I-23 estimates contained fraudulent and fictitious entries. Each of the "Periodical Estimates for Partial Payment" filed by the contractors contained the statement (R. 192, 205):

> All work has been performed and materials supplied in full accordance with the terms and conditions of the corresponding construction contract documents.

Included in the contract, however, and constituting part of the "Contract Documents" was the "Instructions to Bidders" (R. 275). This contained the provision (R. 219, 220):

> The proposal shall be signed by the bidder or bidders with his or their business address, and shall contain the full names of all persons interested with him or them.

In no case did the proposal contain the names of any of the other conspiring contractors (R. 225-226).

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[11] These were duly published regulations as to which defendants are charged with knowledge, since they have the force of law. *United States v. Grimaud*, 220 U. S. 506, 517-521; *Hampton & Co. v. United States*, 276 U. S. 394, 409.

It seems plain, therefore, that each of these "Periodical Estimates for Partial Payment" included a statement that the work and materials had been supplied in accordance with a contract in which no persons other than the particular contractor had an interest. That this was "fictitious and fraudulent" is apparent, *for all of the other participants in the conspiracy were interested in the obtaining and completion of each contract.* As shown above, as the volume of business of the single contractor increased, so proportionately did the chances of the others to obtain a contract increase since subsequent contracts were awarded to the one having the smallest volume (Tr. 903, 919-920). Each contractor is admitted to have been a member of the Electrical Contractors Association, Inc. (R. 6, 33). The monthly dues of this association—fixed at a proportion of the volume of business of the member—increased from ½ per cent in 1935 to 1½ per cent in 1936 (Tr. 971-974). The amount of these dues was hidden and included in job expenses (Tr. 1142-1144, 1146) as one of the elements of the bid (Tr. 902). The result was to force the awarding municipality to subsidize the association. All its members thus had a direct monetary interest in the bid which in each case was by agreement fixed by adding to the average bid a mark-up of 10 per cent for profit and 15 or 20 per cent for overhead (Tr. 898, 1067).

Furthermore, since all these defenders were doing business in the Pittsburgh area, it is obvious that each was heavily interested in all of the collusive bids made, successful and unsuccessful. With respect to the collusive bids on any given project it is plain that the contractor selected to make the low bid had an interest in the other bids since—as representations of the individual bidders' bona fide estimates of a fair price for the work to be done—they tended to created in the minds of the officials of the awarding

authority the impression that the low bid was not unreasonable.

It is also equally plain that each member of the conspiracy was particularly interested in the successful low bid. It contained an arbitrary loading of either 25% to 30% but as the low bid it tended to create a higher standard of values in the community and so to make it easier for each of the conspirators—when by collusion later selected to make the "low" bid on another project—to obtain approval of his equally excessive bid. In *McMullen* v. *Hoffman*, 174 U. S. 639, 646, this Court, speaking of a similar arrangement, noted as its direct tendency—

> Most clearly that it tends to induce the belief that there is really competition between the parties making the different bids, although the truth is that there is no such competition, and that they are in fact united in interest. It would also tend to the belief on the part of the committee receiving the bids that a bona fide bidder, seeking to obtain the contract, regarded the price he named, although much higher than the lowest bid, as a fair one for the purpose of enabling him to realize reasonable profits from its performance. *A bid thus made amounts to a representation that the sum bid is not in truth an unreasonable or too great a sum for the work to be done.* We do not mean it is a warranty to that effect or anything of the kind, but simply that a committee receiving such a bid and assuming it to be a bona fide bid would naturally regard it as a representation that the work to be done, with a fair profit, would, in the opinion of the bidder, cost the amount bid. *Hence it would almost certainly tend to the belief that the lower bid was not an unreasonably high one, and that it would be unnecessary and improper to reject all the bids and advertise for a new letting.* The fact that there were other bids even higher * * * does not alter the tendency of the agreement when carried into effect, to create or to strengthen the belief on the part of the committee in

> the fact of an active competition and the bona fide character of that competition, and that the lowest bid would be in all probability a reasonable one. It is in truth utterly impossible to accurately or fully predict all the vicious results to be apprehended as the natural effect of this kind of an agreement. (Emphasis supplied.)

The same statement or entry in the Form I-23 estimates was fraudulent for another reason in all instances where a certificate of non-collusion was included in the contract documents as part of the bid proposal (R. 225-226, 275). In such instances, the statement in each I-23 periodic estimate that work had been performed "in full accord with the terms and conditions of the contract documents" could not be other than false and fraudulent, since non-collusion was one of the "terms and conditions" in the "contract documents." The variance was obviously material since the rates at which work was charged were much higher than they would otherwise have been.

Finally, it is apparent that the whole account contained in each periodic estimate was a fraudulent entry. Based as they were upon figures which were originally fixed at an excessive level through fraud in the bidding, it is apparent that the periodic progress accounts were but an essential step toward the ultimate goal of the fraud. "It may be affirmed as a principle of law based upon common sense, founded upon reason, and supported by authority that a false pretense which has ultimately accomplished its purpose of fraudulently obtaining money or other property will follow and taint with such fraud every step in the transaction, from its inception to its conclusion, however circuitous its route, or however many agencies it may use." *State* v. *Lynn*, 3 Penn. 316, 333-334 (Del.), 51 A. 878, 883. See pp. 26-28, *supra*.

2. *The false non-collusion certificates aided the obtaining of payment and approval of the claims of the municipalities.*—As stated above, the defendants' contracts were based on fraudulent bidding. Included in the bids was a certificate by the bidder that

> this Proposal is genuine and not sham or collusive or made in the interest or in behalf of any person, firm or corporation not herein named, and that the undersigned has not directly or indirectly, induced or solicited any other bidder to submit a sham bid, or any other person, firm, or corporation to refrain from bidding and that the undersigned has not in any manner sought by collusion to secure for himself an advantage over any other bidder. (R. 226.)

The successful bid, including the false certificate, was made part of the contract (R. 217-276, 226). Each contract, including the false certificate of the bidder, was submitted to, and initially approved by, the Regional Director for PWA (R. 217).

The Regulations of the Federal Emergency Administrator of Public Works provided that the subsequent requisitions of the municipalities (that is, the claims which respondents purposed to aid in obtaining) should be forwarded to the Executive Officer at Washington, where they "will be subjected to a final review and to a check against all of the pertinent project records" (44 C. F. R. 230.24, see Pet. App'x., pp. 30-31). As pointed out above, note 10, respondents are charged with knowledge of this regulation.

The form of Finance Agreement between the United States and the municipality specifically provided that five copies of all executed contract documents be furnished to the PWA before any work was done thereunder (R. 165). It cannot be seriously contended that these construction

contracts, most of which embodied the certificate of non-collusion of the contractor, would be other than highly pertinent in determining the propriety of payments to the municipalities on their intermediate and final requisitions to cover the cost of construction. The certificate of non-collusion was obviously well-calculated to allay any suspicion which might otherwise arise as to the existence of collusive bidding since the sanctions attaching to its falsification must be deemed by any public official to be a definite deterrent. Regardless of their ultimate effect in a particular case, these certificates of non-collusion must be regarded as manifesting a purpose on the part of respondents that they should have their obvious consequence, i. e., aiding to obtain the payment or approval of the claim of the municipality against the United States.

3. *The requisitions of the municipalities were claims against the United States contemplated by the second clause of the statute.*—The phrase "such claims" in the second clause of the statute, by ordinary grammatical construction, refers back only to "any claim upon or against the Government of the United States or any department or officer thereof". Falsity or fiction or fraud in the formal document of claim against the United States is not an essential element of the act penalized in this second clause. It is enough that the supporting "bill, receipt • • • account, claim, certificate" contain a fraudulent or fictitious statement or entry. *United States* v. *Jones*, 32 Fed. 482, 483 (S. C. 1887); *United States* v. *Ingraham*, 49 Fed. 155, 156 (R. I. 1892) aff'd 155 U. S. 434, 437; *Bridgman* v. *United States*, 140 Fed. 577, 589 (C. C. A. 9, 1905). Contra: *United States* v. *Jennison*, 26 Fed. Cas. No. 15,475 at 609 (C. C. Kan. 1874); *United States* v. *Miskell*, 15 Fed. 369, 370 (C. C. Ky. 1883). This Court, on the only occasion on which it has spoken directly

on the subject, *Edgington* v. *United States*, 164 U. S. 361 (1896) said (p. 362):

> Section 5438 of the Revised Statutes makes it penal to make or cause to be made, for the purpose of obtaining or aiding to obtain payment or approval of *any claim against the United States*, any false deposition, knowing the same to contain any fraudulent or fictitious statement. (Emphasis supplied.)

Under this plainly correct reading of the statute, it is irrelevant whether the claims made by the municipalities in their formal documents of requisition upon the United States are properly to be regarded as "fraudulent" or not.

Furthermore, even if the statute were to be construed as requiring that the formal claim of the municipality against the United States be in each case fraudulent, it is not improper to conclude that, since the fraudulent representations made in the Form I-23 claims and in the certificates of non-collusion form part of the supporting fact basis upon which the inflated demands of the municipalities were paid by the United States, the claim of the municipality in each case is to be regarded as a fraudulent claim within the meaning of the second clause.

Claims against the Government invariably and necessarily consist of statements of fact in connection with demands for payment; and it would be a perversion of language to say that the fraudulent I-23 estimates which support the demands of the municipalities and the fraudulent non-collusion certificates which with them formed part of the basis upon which those demands were paid by the United States do not constitute the demands of the municipalities a false claim within the meaning of the statute. *Evans* v. *United States*, 11 F. (2d) 37, 39. The character of the claims of the municipalities—that is to say, whether true, genuine,

and honest, or false, fictitious and fraudulent—must be determined in view of all of the facts and circumstances attending them. *Dimmick* v. *United States*, 116 Fed. 825, 828; cf. *United States* v. *Downey*, 257 Fed. 366, 368. The fraudulent representations of the respondents, as they come to the United States in support of and to some degree as part of the municipalities' demands, are still actively fraudulent. Moreover, to construe the second clause of the statute as covering these facts is merely to read it as adopting the principles recognized at common law.[12]

It is, therefore, submitted that, within the fair intendment of the statute, the claims of the municipalities against the United States were fraudulent claims so far as these defendants are concerned.

4. *Defendants' acts were "for the purpose" penalized by the statute.*—Finally, it must, of necessity, be concluded that the fraudulent Form I-23 claims and the false certificates of non-collusion of the contractors were by them "made," "used," and "caused to be used" "for the purpose of * * * aiding to obtain the payment or approval" of the requisitions of the municipalities upon the United States. For it is axiomatic that the conspirator defendants are presumed to intend the ordinary, natural, probable, or necessary consequence of their voluntary, intentional, and deliberate acts. *United States* v. *Patten*, 226 U. S. 525, 543; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 243.

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[12] *People* v. *Hoffman*, 142 Mich. 531, 544; *People* v. *Genet*, 19 Hun. 91 aff'd 83 N. Y. 436, 452, 453. In 3 Restatement, Torts, sec. 533, *com. d*, with respect to representations to rating companies, it is pointed out:

> The fact that the rating company does not communicate the figures misstated by the maker of the misrepresentations is immaterial. It is enough that their substance is summarized with reasonable accuracy or that the rating given expresses the effect of the misstatements made.

Accordingly, the evidence clearly brings the defendants within the language of the second clause of R. S. sec. 5438 imposing liability upon any one "who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim [against the United States] makes, uses or causes to be made or used, any bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition knowing the same to contain any fraudulent or fictitious statement or entry." In failing even to consider whether a cause of action had been established under this plainly pertinent language of the second clause of R. S. sec. 5438, the court below violated the well-established rule that effect must be given to all parts of a statute. *D. Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *McDonald* v. *Thompson*, 305 U. S. 263, 266.

III.

The Allegations of the Complaint and the Evidence Clearly Showed Violation of the Third Clause of the Statute.

Conspiracy in the form of collusive bidding, the purpose of which was accomplished by the obtaining of the moneys of the United States, is shown, admitted, and expressly found by both courts below. Furthermore, the opinion of the circuit court of appeals acknowledges that, by the acts of the defendants, "the government was • • • defrauded in that it was compelled to contribute more for electrical work on the projects than it would have been required to pay had there been free competition" (R. 472).

The third clause of R. S. sec. 5438 is directed at any form of joint action "to defraud the Government of the United States" in any manner through false or fraudulent claims. It evinces further the basic Congressional intention to assure that the statute would embrace every possible type

of fraud in connection with claims paid in whole or part from Federal funds. It was obviously intended to apply where claims in effectuation of the conspiracy are made, whether directly against the United States or against third parties, if the result is to defraud the United States. For, unlike, and in sharp contrast with, the language of the first and second clauses, the word "claim" in the third clause is not limited to claims "against the United States". The third clause embraces "any false or fraudulent claim". Since Congress elected to frame three separate clauses, the difference in phraseology in the third clause cannot be disregarded. The conspiracy provision was deliberately left general so that the—

> false and forged claims in any of the thousand modes by which it may be done * * * could be punished. (47 Cong. Globe, Part II, p. 954.)

And no reason appears why the situation here presented does not fall within this more general clause. Conspiracy was the gravamen of the complaint here (R. 11-14) and the case was submitted to the jury upon instructions having special reference to conspiracy (R. 133-134, 137-140).

Furthermore, even if this claim be held to require that the claims whose payment or allowance is the means of accomplishing the conspiracy must be claims against the United States, it is apparent from what has been shown above that the defendants are charged with knowledge of the procedure upon claims by municipalities on grants by the federal government adequate to sustain the verdict that they did conspire to defraud the United States by obtaining and aiding to obtain the payment and allowance of claims against the United States. See pp. 20-28, 30-38, *supra*. Yet the court below wholly ignored this third clause of the statute, upon which the complaint and verdict were obviously based.

Conclusion.

The tangible and pecuniary fraud upon the United States consummated by the claims here involved—whether regarded as falling within the first, second, or third clauses of R. S. sec. 5438—is plainly within the scope of the statute. It is a travesty to assume, as does the court below, that Congress intended to protect against claims presented to Federal departments at Washington but not against claims presented to a federal officer or the sponsor of a PWA project at Pittsburgh, where a fraud involving federal funds results in either instance.

The question here is whether the plain language of the statute is to be judicially limited and in large part nullified. No other legislation confers the right to recover penalties and double damages for frauds in connection with claims against the United States. The pressing need for such a remedy for this specific evil has been recently recognized in this Court. See *United States* v. *Cooper Corp.*, 312 U. S. 600, 614. Judicial recognition of the plain intent of Congress and the preservation of the remedies and safeguards created by it require that the decision of the court below be reversed.

Respectfully submitted,

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November, 1942.

APPENDIX.

Revised Statutes.

Sec. 3491. The several district courts of the United States * * * within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done, or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

Code of Federal Regulations.

Title 44—Public Property and Works.

Chapter II—Federal Emergency Administration of Public Works.

Section 201.1 Appointment of Administrator. Pursuant to the authority of "An act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other

purposes", approved June 16, 1933, and in order to effectuate title II—Public Works and Construction Projects—thereof; I hereby appoint Harold L. Ickes to exercise the office of Federal Emergency Administrator of Public Works.

201.2 Delegation of functions and powers. (a) Pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 200; 40 U. S. C. 401), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

(1) To establish such agencies, to accept and utilize such voluntary and uncompensated services, and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary, and to prescribe their authorities, duties, responsibilities and tenure.

(2) Under the conditions prescribed in section 203 of said Act (48 Stat. 202; 40 U. S. C. 403), to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202 of said Act (48 Stat. 201; 40 U. S. C. 402); upon such terms as he shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project; to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project and to lease any such property with or without the privilege of purchase; and to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities.

* * * * * * *

201.4 Delegation of additional functions and powers. By virtue of and pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, 48 Stat. 195 (hereinafter referred to

as the "Act"), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

(a) In his discretion, and upon such terms and conditions as he may prescribe, to sell, assign, transfer, and deliver all securities or any part thereof purchased under the authority of section 203 of the said Act (48 Stat. 202; 40 U. S. C. 403) and of title II of the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934, 48 Stat. 1021, and to apply the proceeds as prescribed by section 203 of the said Act and said Emergency Appropriation Act, fiscal year 1935.

(b) To alter, amend, or waive any or all rules and regulations set forth in Executive Order No. 6252 of August 19, 1933, and any other rule or regulation promulgated by the President under the authority of section 209 of said Act, and to prescribe pursuant to the authority of the said section 209 any other rules or regulations as are necessary to carry out the purposes of said Act; Provided, however, no rule or regulation the violation of which is made punishable by fine or imprisonment under the said section 209 shall become effective until approved by me.

• • • • • • •

202.22 Auditors and engineer inspectors. PWA auditors examine and audit the accounts pertaining to such projects. PWA engineer inspectors observe the construction of PWA projects and make reports concerning the same.

• • • • • • •

216.2 Requirements relative to applications. All applications for financial aid must be in writing and must be prepared and submitted on forms and in accordance with instructions issued and distributed from time to time by PWA through its authorized field representatives. For further information, prospective applicants for financial aid should consult the PWA Regional Director of the region in which the prospective applicant is located.

216.3 Examination of applications. Applications for financial aid are examined, in the first instance, by the Regional

Director's Office. Thereafter, the Regional Director transmits the applications to the Central Office with appropriate engineering, finance, legal and other reports and recommendations. The Central Office then conducts further examinations of the applications and the Directors of the appropriate Divisions in the Central Office as well as other designated PWA employees make any necessary additional reports and recommendations pertinent thereto. All such reports and recommendations are merely advisory to the Administrator. The foregoing is only a general outline of the existing procedure in such matters. The procedure may vary from time to time in order to comply with applicable new Congressional enactments and Executive orders, in which event detailed instructions will be issued and distributed by PWA through its authorized representatives. For further information in regard to these matters, prospective applicants should consult the Regional Director of the region in which they are located.

* * * * * * *

222.1 General Summary of finance agreement. The finance agreement, to which the United States of America and the applicant are parties, consists of an offer on the part of the Government and the applicant's acceptance thereof. Such agreement contains the terms and conditions upon which the Government offers to make a loan and grant, a loan only or a grant only, as the case may be. It describes the project briefly and states the amount of the loan and grant, the loan only or the grant only, as the case may be. In the case of a loan and grant or a loan only, it also sets forth the method of making the loan, the type and denomination of the security which the Government agrees to purchase, the interest rate, the place of payment, registration privileges and maturities.

* * * * * * *

222.20 Construction account. The applicant must establish a separate account or accounts (herein collectively referred to as the "Construction Account") in a bank or banks which are members of the Federal Deposit Insurance Corporation. The advance grant payment, the intermediate

grant payments, the proceeds from the sale of the bonds (exclusive of accrued interest), applicant's funds, the final grant payment and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the project must be deposited in the Construction Account promptly upon receipt thereof. All accrued interest paid by the Government at the time of delivery of any bonds must be paid into a separate account (herein referred to as the "Bond Fund"). Payments for the construction of the project must be made only from the Construction Account.

222.21 Disbursement of moneys in Construction Account. Moneys in the Construction Account must be expended only for such purposes as shall have been previously specified in a signed certificate of purposes filed with and accepted by the Government. After all costs incurred in connection with the project have been paid, if any bonds are then held by the Government, all moneys remaining in the Construction Account must be used in repurchase bonds or must be transferred to the Bond Fund.

* * * * * * *

230.1 Grant base. The grant base will be that administratively determined portion of the project costs which is used to compute the grant earned by the applicant. On a PWA non-Federal NIRA project the grant base will depend upon the cost of only the labor and the materials employed upon the project. On other PWA non-Federal projects the grant base will depend upon the cost of the project.

230.2 Computation. The computation of the grant base will be made by auditing all costs incurred by the applicant in constructing the approved project and then selecting those items of costs which are administratively determined to be eligible for inclusion in the grant base. With certain restrictions and exceptions, the cost of equipment which is called for by the finance agreement as a permanent part of the project will be includable in the grant base.

* * * * * * *

230.21 Purpose. A grant requisition consists of a public voucher and certain supporting documents which must be prepared by the applicant for the purpose of obtaining a payment on account of the grant.

230.22 Kinds. Grant requisitions on PWA non-Federal NIRA projects are known as "advance", "partial", "intermediate", "semi-final", "final", and "supplemental final". Grant requisitions on * * * PWA non-Federal projects are known as "advance", "intermediate", "semi-final", "final", and "supplemental final".

230.23 Submission. An advance grant requisition may be submitted immediately after the PWA finance agreement has been entered into. The payment of an advance grant is entirely optional with the Administrator. Partial, intermediate and semi-final grant requisitions may be submitted at specified times during the course of construction of the project. The final grant requisition may be submitted only after the project is entirely completed and all project costs are known. Supplemental final grant requisitions are used when necessary to adjust the grant account.

230.24 Review. When the applicant has prepared a grant requisition in the required number of copies, together with the supporting documents, the applicant must deliver it to the engineer inspector assigned to the project. The engineer inspector will review it for completeness, eligibility for payment as affected by the physical condition of the project, compliance with the PWA finance agreement and the established policies of PWA. On completion of his review the engineer inspector will submit the requisition with his recommendations to the Regional Director who will give due consideration to the recommendations of the engineer inspector and will compare the financial entries on the requisition with the project audit made by the Division of Accounts. The Regional Director will then submit the requisition with his recommendations to the Executive Officer of PWA at Washington, where it will be subjected to a final review and to a check against all of the pertinent project records.

230.25 Payment. After a grant requisition has been finally cleared and the amount of the earned grant has been administratively determined at the Washington Office of PWA, payment on account of the grant will be made to the applicant by means of a warrant on the Treasury of the United States of America.

* * * * * * *

237.8 Construction reports. The owner must require that there shall be submitted to it by each construction contractor and must, in turn, submit to the Administrator's authorized representative or agent, schedules of the costs and quantities of materials and of other items which schedules shall be in such form and shall be supported as to correctness by such of the estimates upon which they are based as such representative or agent may require. The owner must also require that there shall be submitted to it by each such contractor, and must, in turn, submit as above-stated, the following records on forms to be supplied by the Government: Detailed Estimate, and Periodical Estimates for Partial Payment.

* * * * * * *

237.13 Payment. Not later than the 15th day of each calendar month, the owner must make partial payment to each construction contractor on the basis of a duly certified and approved estimate of the work performed during the preceding calendar month by the particular contractor, but must retain at least 10 percent of the amount of each such estimate until final completion and acceptance of all work covered by the particular contract. The owner must require that each such contractor shall pay: for all transportation and utility services not later than the 20th day of the calendar month following that in which such services are rendered; for all materials, tools, and other expendible equipment, to the extent of 90 percent of the cost thereof, not later than the 20th day of the calendar month following that in which such materials, tools, and equipment are delivered at the site of the project, and the balance of the cost thereof not later than the 30th day following the com-

pletion of that part of the work in or on which such materials, tools, and equipment are incorporated or used; and to each of his construction subcontractors, not later than the 5th day following each payment to such contractor, the respective amounts allowed such contractor on account of the work performed by such subcontractors, to the extent of each such subcontractor's interest therein.

No. 173

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

UNITED STATES OF AMERICA EX REL. MORRIS I. MARCUS AND MORRIS L. MARCUS IN HIS OWN BEHALF,

Petitioner,

v.

WILLIAM F. HESS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

HOMER CUMMINGS,
WILLIAM STANLEY,
CHARLES J. MARGIOTTI,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 173

UNITED STATES OF AMERICA ex Rel. MORRIS L. MARCUS and MORRIS L. MARCUS in His Own Behalf,

Petitioner,

v.

WILLIAM F. HESS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In their briefs on the merits filed in this Court, both respondents and the Government raise certain questions which were either rejected or not passed upon by the Court below.

I.

This Suit by Petitioner Is Clearly Authorized by R. S. Secs. 3490-3493

Respondents, invoking a purported rule based on certain lower court opinions, contend that penal statutes in general and R. S. sec. 3490 in particular are to be construed strictly.[1] The Government disavows this purported rule (Gov't Br. 23), as indeed it must in view of the numerous occasions on which this Court has denied the existence of any such narrow rule of construction and reiterated instead that words of even a penal statute are to be fairly construed and given effect according to their fair meaning in accord with the evident intent of Congress. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 358-359; *United States* v. *Bowman*, 260 U. S. 94, 102; *United States* v. *Raynor*, 302 U. S. 540, 552.[2]

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[1] It is unnecessary to deny and we may even accept, arguendo, the correctness of the quotation from *Taft* v. *Stephens Lith. & Eng. Co.*, 38 Fed. 28, 29 (Resp. Br. 25; Gov't Br. 22-23). Petitioner asks nothing more than an application of the plain language to effectuate the evident purpose of R. S. sec. 3490. Respondent does not even attempt, and the Government fails utterly, to show that the language of R. S. sec. 3491 providing for a qui tam proceeding is in any wise strained to here authorize action by this plaintiff. It is equally clear that nothing has been done to make "his recovery easy". Moreover, "the statute here involved is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly." *United States* v. *Griswold*, 24 Fed. 361, 366, aff'd 30 Fed. 762.

[2] Indeed, the rule is that "a statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction". *Northern Securities Co.* v. *United States*, 193 U. S. 197, 359. As was but lately said by the Circuit Court of Appeals for the Fifth Circuit in *Spivey* v. *United States*, 109 F. 2d 181, 184-185: "The force and effect of statutes of this kind, designed to prevent frauds upon the Government may not be frittered away by a mere literal construction. • • • While Criminal Statutes may not by process of construction, be extended beyond their reasonable and natural meaning, neither may they be, by the same process, deprived of their natural meaning."

Petitioner differs only on the first point in the brief of the Solicitor General, wherein the latter takes the position that petitioner here did not discover the fraud initially and therefore is not authorized to bring this suit. Neither in fact nor upon the face of the statute is such a position sound.

(1) While the considerations advanced by the Solicitor General might well be made the subject of representations to Congress in an effort to obtain amendment of the law, it is plain that the attempted construction of the existing law as it has stood since 1863 violates basic rules of statutory interpretation, is at war with the congressional intent evinced by the legislative history of the Act, ignores the background of prior legislation with respect to informer actions in the light of which this particular statutory language was enacted and must be applied, and in any event is contrary to the facts here.

(a) The statutory language in question is plain. The civil suit for violation of the provisions of R. S. sec. 5438 is authorized by R. S. sec. 3490. The language which the Government seeks to construe and limit is contained in R. S. sec. 3491:

> Such suit may be brought and carried on by any person, as well for himself as for the United States.

This language is not ambiguous. It says "such *suit* may be brought and carried on by *any* person" (emphasis supplied). Yet the Government, without even suggesting any ambiguity, seeks to limit its plain meaning by suggestions of unfair benefit to the plaintiff and inconvenience to the Attorney General. But a statute must be held to mean what the language imports:

> Where no ambiguity exists there is no room for construction. (*United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269, 277.)

> When [the language] is clear and imperative, reasoning ab inconvenienti is of no avail. (*The Cherokee Tobacco*, 11 Wall. 616, 620.)
>
> No single argument has more weight in statutory interpretation than this. (*Browder* v. *United States*, 312 U. S. 335, 338.)

In any event there is, manifestly, no room for this construction now urged for the first time in any court in any case.

(b) The Government's labored contention is that the legislative history "shows that Congress intended to permit actions by private individuals only when they were actually assisting the enforcement of the law by uncovering and punishing offenses against the United States" (Gov't Br. 15). The legislative history, quite to the contrary, shows that while the Congress was concerned with the investigation of frauds it was equally concerned that those guilty of fraud, many of whom were at the time well-known and notorious, should by prompt and effective judicial proceedings be forced to account for their ill-gotten gains resulting from frauds on the Government. The debates in the Senate show clearly that the concern of the legislature was not so much with the investigative faculty—many of the fraudulent contractors had been exposed and were well-known—but with the failure of public officials to protect the rights of the United States by effective court action. The facts of frauds were well-known. The trouble was that nobody did anything about them.

The statute is to be construed in the light of the particular evils at which it was aimed. *Warner* v. *Goltra*, 293 U. S. 155, 158; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489. The debate showing common agreement as to the purpose of the act and the evils which it sought to remedy may be considered. *Federal Trade Comm.* v. *Raladam Co.*, 283 U. S. 643, 650; *Humphrey's Executor* v. *United States*,

295 U. S. 602, 625. It is plain that one primary and definite objective was to protect the rights of the United States after the fact of their violation had been ascertained, by encouraging the actual bringing of suit by private individuals regardless of whether such individuals had been solely responsible for the unearthing of the existence of the fraud.

During the course of debate in the Senate the following statements were made:

> Mr. COWAN: * * * Indeed, it is not now so much for the want of law that this mischief prevails everywhere, as it is from a seeming utter unwillingness on the part of those in authority to vindicate the laws that already exist by subjecting to punishment those who are guilty.
>
> I am not so certain but that there are now on the statute-book laws ample to provide for the complete punishment and prevention of these frauds but nobody does it. We appoint a committee to investigate a certain subject; that committee makes a report which astounds everybody, or certainly would astound everybody in every other country but this; and the guilty men go abroad; and they perform their customary and their usual avocations; they are received among their friends just as before; perhaps their character is somewhat heightened by the adroitness they have manifested in their diabolical schemes for the purpose of procuring money from a distracted, and what will in a short time be an impoverished country. Why is this, Mr. President? Are there no courts; are there no district attorneys; is the form of indictment lost; or is it taken to be understood that a man can cheat the Government with impunity, although as to all other people he is amenable to the municipal laws for preventing frauds and cheats? I have no doubt that if the officers of the Government would do their duty when a man is caught procuring money by these pretenses, and false and forged claims in any of the thousand modes by which it may be done,

> he could be punished. He could be now if the proper officers were on his trail, and if the proper precautions were taken to enforce the laws we now have. (Cong. Globe, 37th Cong., 3d sess., p. 954; and see also pp. 956, 958.)

The common purpose to stimulate *suits* to enforce the rights of the United States both by district attorneys and as well by others on behalf of the United States is thus apparent from the legislative history of the statute, irrespective of who discovered the facts or how they were discovered in any particular case.

That encouragement of suit as well as stimulation of investigation was an objective of the bill is also apparent from the injunction of diligence contained in section 5 of the Act of March 2, 1863, 12 Stat. 696, 698, now R. S., sec. 3492. It is there specifically made the duty of United States district attorneys to be diligent (1) "in inquiring into any violation • • • by persons liable to such suit" and (2) "to cause them to be proceeded against."

(c) Earlier statutes providing for reward to informers make it clear, not only that the undesirable features of divided control were well-known but that, had Congress desired to reward private parties who merely uncovered frauds by investigation, the form of statute appropriate to such end was well-known. The obvious method, where it was intended that the United States should retain control of the suit, as in indictments or even on informations or actions of debt for fines and forfeitures, was to provide merely that a moiety of the fine or forfeiture recovered in a Government suit should be paid to the informer. *Cf.* Act of April 30, 1790, c. 9, sec. 16, 1 Stat. 112, 116; Act of March 3, 1791, c. 15, secs. 43, 44, 1 Stat. 199, 209; Act of March 3, 1839, c. 80, secs. 6, 11, 5 Stat. 331, 335, 336; Act of March 2, 1799, c. 22, sec. 91, 1 Stat. 627, 697. *Cf. Briscoe* v. *Hinman*,

4 Fed. Cas. No. 1,887, at 153 (D. C. D. Oreg., 1869). *Matthews* v. *Offley*, 16 Fed. Cas. No. 9,290, at 1130 (C. C. D. Mass., 1839). Here, on the contrary, nothing could be clearer than the language of R. S., sec. 3491;

> Such *suit* may be brought and carried on by *any* person, as well for himself as for the United States.

Congress deliberately selected the qui tam *suit* rather than providing merely a reward for the informer. In so doing, it was following a practice as ancient as the common law. 3 Blackstone, Comm. sec. 161 (Lewis ed.).

It is thus apparent that the Solicitor General not only undertakes to construe language unambiguous upon its face but by such purported construction in large part nullifies it.

(2) Moreover, neither the respondents nor the Government present the true facts. The respondents directly, and the Government at least by implication, attempt to have it that petitioner both relied solely upon evidence discovered by the Government and slipped into court to file the action before the Government could do so. The issue so raised is as much one of fact as of law. The Government raises the point in this Court for the first time, and there is thus no record on the subject except the sworn objection and answer of petitioner (hereinafter referred to as "Objections"), filed in the court below in opposition to the petition of the United States to file a brief as amicus curiae which has been certified to this Court following the filing of the Government's brief here. Respondents themselves had previously certified to this Court the brief of the Government in the court below, which the Solicitor General here does not adopt in any part. These documents, and the facts of record, disclose the following:

(a). Although the Government's position now is that petitioner is not authorized to bring the suit (Gov't Br. 10), it

states that it has assumed that it could not bring "a separate suit • • • after petitioner commenced this action" (Gov't Br. 13). But of course, if the Government's position is correct, it could have brought its suit at any time whether or not petitioner's unauthorized action was pending. Not only that, but it was then the duty of the Government to bring its suit and not risk the litigation to private hands. Indeed, petitioner's suit did not even cover many of the PWA projects involved, because petitioner did not know about them (Objections, pp. 6-7), but the Government has made no attempt to sue upon them. Moreover, the Government has allowed the statute of limitations (31 U. S. C. sec. 235) to run on many of these projects.

(b) Elsewhere in its brief the Government confesses that it has never brought such a suit as this:

> The Government itself has not, to our knowledge, brought both types of proceedings against the same person. (Gov't Br. 45.)

In truth, the statute has lain dormant at the hands of the Government since 1863. Petitioner, and petitioner alone, has resurrected it in the attempt to secure enforcement of the Congressional mandate of the statute.

(c) Since the point now raised by the Solicitor General was not raised in either of the courts below, the facts could not be and are not in the record. Petitioner has not only spent $25,000 but presented far more evidence than the Government had ever discovered. In addition, petitioner and counsel undertook a three-month trial—the longest jury trial in the history of Pennsylvania. The Government, moreover, did not discover the frauds here involved. As set forth in the Pittsburgh Press, March 24, 1941:

> Long before the U. S. investigation the existence of this ring was common knowledge. • • •

> The case just completed revealed intimate details of the conspiracy for the first time. • • •
>
> The Pittsburgh Press published full details of that situation, called on the school board to take legal action and urged a grand jury investigation. • • •
>
> Electrical prices in Pittsburgh became scandalous—so high that they discouraged building and retarded industry. Contractors have said that they were the highest in the United States. • • •
>
> But still the school board and the city and county solicitors have taken no steps to recover the money of which they were defrauded, as repeatedly revealed by testimony in the Margiotti case. (Objections, pp. 60-63.)

The Government can thus reap little commendation for compromising its criminal proceeding for a paltry $50,000 and then ignoring the civil liability of respondents—particularly in view of the statement of Government counsel in open court in its criminal proceeding that the conspiracy here involved

> has defrauded the government out of hundreds of thousands of dollars in this immediate area. • • • The fraud on the government in this instance has amounted to somewhere in the neighborhood of half a million dollars. (Objections, p. 43.)

(d) Finally, the written record—as shown by letters passing between Margiotti, counsel for petitioner, and officers of the Department of Justice—shows beyond doubt that the Government raised no objection to petitioner's suit as such, at least acquiesced in it until just before argument in the circuit court of appeals, and in fact took the unequivocal position only that respondents were not liable either to the United States or anyone suing on behalf of the United

States. These facts—all documentary—may be summarized, chronologically, as follows:

Petitioner's counsel informed the United States Attorney of the filing of the action and stated, "We invite you to enter your appearance for the United States" (Objections, p. 23). The Department of Justice at Washington asked for and received copies of the complaint filed by petitioner (Objections, pp. 24-25). The Attorney General was asked to join in the proceedings and, in any event, to confer with counsel for petitioner (Objections, pp. 25-27). The Department of Justice took the position that there was no authority to maintain the action (Objections, pp. 29-31) because the complaint was insufficient "to state a cause of action" since suit "will lie only when such violation consists in the submission of a false claim" whereas—according to the Government then—the instant case "does not set up a violation by the submission of a false claim" (Objections, p. 33). Petitioner's counsel then pointed out that, even if no direct claim were involved, other clauses of the statute covered the case (Objections, pp. 36-39). A conference was arranged (Objections, pp. 40-41) and held in the Attorney General's own office with three officers of the Department, who felt that the matter "was the problem of the P. W. A. and not the Department of Justice," stated that the latter "probably would not join" in the proceeding, but indicated that the Department would not "place any obstacle in plaintiffs' way" (Objections, 41-42, 45-46). The Department and United States Attorney were then asked to furnish certain data (Objections, 50-52, 55-58).[3]

[3] Petitioner's counsel also asked the cooperation of PWA (Objections, pp. 28-29). PWA referred it to the Department of Justice (Objections, pp. 34-36). A conference was held and a further letter written asking cooperation (Objections, pp. 42-44). As the time of trial approached, further letters were sent asking cooperation and data (Objections, 47-50) which was finally forthcoming in part (Objections, pp. 52-53).

Upon the successful termination of the suit, the Department was advised (Objections, p. 57), to which Assistant Attorney General Thurman Arnold replied

> Congratulations on a splendid victory. (Objections, p. 63.)

The Pittsburgh Press stated

> Attorney Charles J. Margiotti rushed in where public officials feared to tread • • •
>
> Perhaps the most amazing thing about this case has been the failure of the city and county governments, the Pittsburgh school board and [state] District Attorney Andrew T. Park to seek return of the amounts of which they were defrauded • • •
>
> The federal government had to do a job that could and should have been done locally. And now a private citizen has recovered damages for the Federal government. (Objections, pp. 60-63.)

Assistant Attorney General Arnold also wrote Margiotti that

> Our attitude on appeal will be consistent with that adopted prior to the trial. (Objections, pp. 63-64.)

Thereupon, Margiotti wrote the Assistant Attorney General that

> Since the institution of this suit, many of the defendants have been transferring their real estate and disposing of their assets in a desperate effort to place their property beyond the reach of execution. • • •
>
> The defendants, through their attorneys, have been intimating that they have contacted certain representatives of the Government and that there is a likelihood that the Government is willing to relinquish its interest in the verdict, or at least they are trying to

make an effort to have the Government do so. (Objections, pp. 65-67.)

To which he received the following reply:

> We know of no attempts by the defendants to persuade the United States to relinquish its interest in the judgment, nor have we heard that the Government is even considering doing so. (Objections, p. 68.)

The details with respect to the attempt of defendants to have the Government waive its interest in the judgment are not in the record or objections, and hence are not included here.

Thereupon the defendants sought to compromise their liability, with the active participation of officers of the Department of Justice; and their offer of $100,000 in settlement had been accepted by the Attorney General and petitioner (Objections, pp. 69-74). Then, however, Assistant Attorney General Arnold filed his petition and brief in the court below for the first time attacking the right of petitioner to bring the action (see the brief certified to this Court by respondents), and thereupon respondents withdrew their offer of compromise (Objections, pp. 75-76). By this action, the Government deliberately abandoned its right to half the recovery already made by petitioner.

Finally, it may be noted that both the court below and the Solicitor General find no merit in the points raised by Assistant Attorney General Arnold. Instead, the Solicitor General has phrased a new issue which, as set forth above, is not only unsound in law but unfounded in fact.

II.

None of the Respondents Is Subjected to Double Jeopardy.

Respondents contend that the recoveries here involved subject them to a second jeopardy. The Fifth Amendment provides:

> Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

There has been no violation of this constitutional protection in this suit, for either or both of the following reasons: (1) Respondents are not being twice held to answer for the "same offense". (2) The sanctions imposed in this suit under R. S. sec. 5438 are purely remedial and not punitive in character.

Respondents base their contention of double jeopardy on the following facts appearing from documents offered but not received in evidence: On November 3, 1939, a true bill was returned against them (R. 295, 301) charging a violation of Section 37 of the Criminal Code, 18 U. S. C. sec. 88:

> If two or more persons conspire * * * to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

On January 5, 1940, certain of the defendants pleaded nolo contendere to this indictment and the remainder changed their pleas to non contendere on the same day (R. 295-296). On February 6, 1940, the court imposed fines on the defendants in a total sum of $44,000 (R. 299-300).

There were also returned against practically all of the defendants 36 additional indictments under section 35A of the Criminal Code as amended in 1934 and 1938 (18 U. S. C. sec. 80):

> whoever shall * * * make or use or cause to be made or used any false * * * certificate * * * knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined not more than $10,000 or imprisoned not more than ten years or both.

In each instance the charge was that the named defendants had in one or more instances made and used and caused to be made and used a specified false certificate knowing the same to contain fraudulent and fictitious statements in a matter within the jurisdiction of a department and agency of the United States in that, in filing bids on certain PWA projects, they had submitted false and fraudulent certificates of non-collusion (R. 322-329). On these 36 indictments no plea was entered by defendants but on February 15, 1940, each was *nolle prossed*.

The respondents also offered to show (R. 125-126) by Mr. Neil Andrews, a special assistant to the attorney general in charge of the criminal prosecutions against defendants, that

> he agreed with the defendants in this case who were also defendants in those criminal proceedings • • • that if the defendants would plead nolo contendere to the indictment at No. 10462 Criminal, the Government would be satisfied with whatever punishment the Court imposed in that case as being also in complete satisfaction of all criminal liability of the defendants on all of the indictments, both for the alleged conspiracy and the false certificates and affidavits of non-collusion which were the matter of the indictments.

The counsel for defendants further stated what has continued to be their contention (R. 126):

> The main purpose is to show that the defendants have already been punished for the same acts upon which a recovery is sought in the present suit, and that, therefore, no recovery for penalties or forfeitures or double damages can be had against them in any other case, and no recovery whatever in this case (Resp. Br. 75-96).

The problem here, therefore, is whether upon the facts there is any double jeopardy involved.

A. THE RESPONDENTS HAVE FAILED TO SHOW THE NECESSARY IDENTITY OF OFFENSES.

The principles of law applicable under the double jeopardy clause are well-established. A defendant may not twice be put in jeopardy of punishment for the *same* offense. But respondents have failed to show that the offenses which were charged in any of the indictments involved in the criminal proceedings are the same as those upon which the verdict and judgment in the instant case were based.

As to the offense of conspiracy charged in indictment No. 10,462.—The conspiracy charged in indictment No. 10462 is distinct and different, as a matter of law, from any of the offenses here involved. In *Burton* v. *United States*, 202 U. S. 344, 380, this Court held:

> It must appear that the offense charged, using the words of Chief Justice Shaw, "was the same *in law* and *in fact*. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact.*"

In *Gavieres* v. *United States*, 220 U. S. 338, 342, this Court held and in *Blockburger* v. *United States*, 284 U. S. 299, 304, reaffirmed:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

So tested, there is clearly no double jeopardy here.

The conspiracy under section 37 of the Criminal Code charged in the indictment is clearly different from the offenses specified in the first and second clauses of R. S. sec. 5438. Violation of the first clause of the latter statute

could be shown only by evidence of the making of a claim against the United States or the causing of one to be made. Violation of the second clause could be shown only by evidence of the making of false or fraudulent statements, or the causing of them to be made, for the purpose of obtaining or aiding to obtain the approval of claims against the United States. Neither clause requires showing of a conspiracy. On the other hand, conviction on the indictment under Section 37 of the Criminal Code would require proof of a conspiracy, but not the making or aiding of a claim against the United States.[4]

The conspiracy under section 37 of the Criminal Code charged in the indictment is also an offense clearly different in law from the conspiracy inhibited by the third clause of R. S. sec. 5438 and charged in the instant case. The latter clause prohibits conspiracy to defraud the United States "by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim". This particular object of the conspiracy had to be proved under R. S. sec. 5438, but not under Section 37 of the Criminal Code.[5]

It is therefore apparent that there is here involved no second jeopardy for the conspiracy charged in the indictment in No. 10,462 which is the only offense for which respondents have ever suffered punishment.

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[4] It is well established that conspiracy and substantive offenses each involve proof of elements not essential to proof of the other and are therefore not the same. *Carter* v. *McGlaughry*, 183 U. S. 365, 394; *United States* v. *Rabinowich*, 238 U. S. 78, 85; *Chew* v. *United States*, 9 F. 2d 348, 353; *Bell* v. *United States*, 2 F. 2d 543, 544 (C. C. A. 8, 1924); *Coy* v. *United States*, 5 F. 2nd 309, 310 (C. C. A. 9, 1925).

[5] By definition, the offense under the third clause of R. S. sec. 5438 is complete upon a showing of the agreement and the specified object without the necessity of establishing any overt act in furtherance of the conspiracy. On the other hand Section 37 in terms requires evidence of any type of overt act. Under R. S. sec. 5438 the inhibited act is complete and the cause of action is sustained upon the showing of the fact of combination with ensuing damage.

As to the substantive offenses charged in indictments Nos. 10463-10498.—The respondents also rely on these indictments as showing that "double punishment is being inflicted for the same acts in this case" (Resp. Br. 91). This contention is obviously without merit.

In the first place, as the Solicitor General points out (Gov't 53, note), these indictments were *nolle prossed* without so much as a plea having been filed as to any of them. It is elementary that jeopardy within the meaning of the Fifth Amendment does not attach, and an indictment may be *nolle prossed*, at any time before a jury is impaneled and sworn without giving rise to a plea of *autrefois acquit*. *United States* v. *Van Vliet*, 23 Fed. 35, 36; *McCarthy* v. *Zerbst*, 85 F. (2d) 640, 642; *Buie* v. *United States*, 76 F. (2d) 848, 849, cert. denied 296 U. S. 585; *United States* v. *Percansky*, 298 Fed. 991, 993, err. dism., 5 F. (2d) 1020; *Wolff* v. *United States*, 299 Fed. 90, 91.[6]

Secondly, respondents have failed utterly to show that the transactions which were adduced in evidence by petitioner to support the cause of action under clauses one and two of R. S. sec. 5438 are the same transactions which were specified as violations of law in indictments Nos. 10463-10498. The defense of double jeopardy is an affirmative defense and respondents have the burden of proving that the transactions which constitute the offenses upon which recovery in this suit is based are the identical offenses which were the subject matter of the *nolle prossed* indictments. If the transactions in the two cases are not the same *in fact* there obviously can arise no question of identity in law. It is apparent from the portions of the

[6] In the light of this uniform course of decision we join with the Solicitor General in the view that the decision in *United States* v. *Chouteau*, 102 U. S. 603, should be limited to the peculiar situation there involved (Gov't Br. 53). But it is plain that it is here unnecessary to determine the true effect of that decision.

record here printed (R. 190, 202), from respondents' brief (Resp. Br. 9), and from our main brief (p. 10) that violation of the first and second clauses of R. S. sec. 5438 was shown by the I-23 certificates of monthly partial payment claims of the contractors as well as by the certificates of non-collusion filed by the bidders, successful and unsuccessful. Each non-collusion certificate and each I-23 claim containing a false or fraudulent statement or entry is plainly a separate substantive offense under the second clause of R. S. sec. 5438. *Blockburger* v. *United States*, 284 U. S. 299, 303; *Ebeling* v. *Morgan*, 237 U. S. 625, 629. Respondents do not even allege, much less show, that all of the certificates and claims upon which verdict was based in this case were charged as violations of law in the *nolle prossed* indictments. And as a practical matter they cannot show here and could not show in the circuit court of appeals that there was not in the trial court evidence of false I-23 claims or certificates of non-collusion by each one of the named defendants including Ridinger, Sr., and Jr., Bickford and the Iron City Engineering Company. Obviously, if respondents wished to have the circuit court of appeals or this Court hold either that there was no evidence in this case of claims or certificates other than those specified in the indictments or that certain of the defendants made no false certificates of non-collusion or I-23 claims, then it was incumbent on them to have certified to the circuit court of appeals all of the evidence in the case. The appellate court obviously cannot pass on such a question when the appellant brings up a record on appeal which constitutes only a part of the evidence presented in the trial court (R. 392-399). *Krauss Bros. Co.* v. *Mellon*, 276 U. S. 386, 390; *City* v. *Babcock*, 3 Wall. 240, 244; *Wertz* v. *National City Bank of Evansville, Ind.*, 115 F. (2d) 65, 67.

It is therefore submitted that, even if it be assumed, arguendo, that the sanctions imposed under R. S. sec. 3490

for violation of the provisions of R. S. sec. 5438 are properly to be regarded as punitive, the respondents have failed to show that the offenses upon which the instant judgment was based are the same offenses as those covered by the indictments upon which they rely. The asserted identity of offenses is clearly not sustained.

B. THE SUIT UNDER R. S. SEC. 3490 IS REMEDIAL.

The opinion of this Court in *Helvering* v. *Mitchell*, 303 U. S. 391, went far to resolve the fog of uncertainty which theretofore surrounded the question of double jeopardy where civil suits were brought by the United States to enforce monetary relief in addition to fines (or imprisonment) imposed by criminal proceedings. The basic test there laid down is whether the sanction itself is remedial or punitive in character as distinguished from the form of the proceeding. *Id.*, p. 400, note 3. It has always been clear, of course, that the pecuniary detriment to the defendant, which must obtain in any event, does not necessarily render the imposition punitive in nature or penal in effect. *Tayloe* v. *Sandiford*, 7 Wheat. 13, 17; *Stearns* v. *United States*, 22 Fed. Cas. No. 13,341 at 1192 (C. C. Vt.); *Taylor* v. *United States*, 3 How. 197, 210; *Murphy* v. *United States*, 272 U. S. 630, 631-632; *United States* v. *Nash*, 111 Fed. 525, 528.

It is plain that the statute here involved as finally passed, after amendment in the House, contains provisions for three separate and distinct things—(1) for penalties by way of fine and imprisonment in a criminal proceeding, (2) for the payment of a fixed sum and (3) for a variable amount of money to reimburse the United States for damages suffered by it in its proprietary capacity. That Congress intended these to be cumulative is apparent on the face of the original statute itself, for it provided that any person

> who shall do or commit any of the acts prohibited by any of the foregoing provisions of this act * * * shall forfeit and pay to the United States the sum of two thousand dollars, *and in addition*, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit, *and* every such person shall *in addition thereto*, on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one, nor more than five years, or by fine of not less than one thousand dollars, and not more than five thousand dollars. (Act of March 2, 1863, sec. 3, 12 Stat. 696, 698, [R. S. secs. 5438, 3490].) (Emphasis supplied)

The question here, therefore, is whether—because of constitutional limitations—the statute shall be cut down by construction.

Here the Congress, taking cognizance of the private injury to the United States as a corporation or body politic and in its proprietary as contrasted with its sovereign capacity, enacted a special statute creating a remedy for the private injury resulting from the direct pecuniary loss incident to the indicated frauds. The purely remedial character of the provisions for a fixed forfeiture and double damages enforcible by distinct civil proceedings in a single suit is emphasized by the provision *in the same section* of the original Act for punitive sanctions to be enforced by separate criminal proceedings. Cf. *Helvering* v. *Mitchell*, 303 U. S. 391, 402.

Because the statute clearly contemplates compensation to the United States for damages suffered in its pecuniary or property rights, the essentially remedial character of the sanction provided in R. S. sec. 3490 is much clearer than that of the additional tax involved in the *Mitchell* case,

since all liabilities there imposed on the taxpayer were based upon the sovereign power of taxation.

> The powers of the United States as a sovereign dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. The restraints of the Constitution upon their sovereign powers cannot affect their civil rights. (*Cotton* v. *United States*, 11 How. 229, 231.)

The United States with respect to its own property has a power analogous to the police power of the States measured in the extent of its exercise only by the exigencies of the particular case, and with respect to its property has the rights of an ordinary proprietor to maintain its possession and obtain redress for violation of its rights as could a private individual. *Camfield* v. *United States*, 167 U. S. 518, 525. "Many trespasses are also public offences, by common law, or are made so by statute. But the punishment of the public offence is no bar to the remedy for the private injury." *Cotton* v. *United States*, 11 How. 229, 232; *Stone* v. *United States*, 167 U. S. 178, 188-189. So here it is plain that the prescribed remedy for the private injury to the United States—forfeiture of the fixed sum of $2,000 and double damages—cannot reasonably be held to be barred by the fact that the wrongdoers are also guilty of, and have been fined for, a public offence.

The provision here for a fixed $2,000 forfeiture plus double damages bulks no larger in amount than the treble damages authorized under section 7 of the Sherman Act. The federal courts have taken the view that Section 7 is intended to provide compensation for injuries to property,

and is remedial in purpose. Thus, for the purpose of applying statutes of limitation, the courts have held that an action under Section 7 is remedial and not an action to recover a penalty or forfeiture. *City of Atlanta* v. *Chattanooga Foundry & Pipe Co.*, 101 Fed. 900, 904, reversed on other grounds, 127 Fed. 23 (C. C. A. 6th), affirmed 203 U. S. 390; *Hansen Packing Co.* v. *Swift & Co.*, 27 F. Supp. 364, 367 (D. C. S. D. N. Y. 1939); *Jones & Co.* v. *West Publishing Co.*, 270 Fed. 563, 566 (C. C. A. 5th); *Shelton Electric Co.* v. *Victor Talking Mach. Co.*, 277 Fed. 433, 435 (D. C. N. J. 1922). The same view has been taken in cases involving the question of whether the right to sue under Section 7 survives death. *Sullivan* v. *Associated Billposters*, 6 F. (2d) 1000, 1009 (C. C. A. 2d); *Imperial Film Exch.* v. *General Film Co.*, 244 Fed. 985, 987 (S. D. N. Y. 1915); *Moore* v. *Backus*, 78 F. (2d) 571, 575 (C. C. A. 7th). See also *Baush Machine Tool Co.* v. *Aluminum Co.*, 63 F. (2d) 778, 780, cert. denied, 289 U. S. 739, holding that an action under Section 4 of the Clayton Act for triple damages is not a suit for penalty and, hence, that a bill of discovery may be maintained in aid of the suit. The cases are collected and examined in *Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?* by Lawrence Vold, 28 Ky. L. J. 117-159. The author concludes (p. 149): "As already shown, the threefold damage provision is here compensatory in its nature, in liquidating compensation for accumulative intangible harm going beyond the ordinarily recoverable legal damages to the business or property." See also *Right of United States to Sue for Treble Damages*, 89 U. of Pa. L. Rev. 243-245, fn. 10.

As pointed out in *Helvering* v. *Mitchell*, *supra*, p. 400,

> forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789

and as being civil in nature "against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." The same case also recognizes the fact that, where Congress has provided a distinct civil procedure for the collection of the additional liability, this is regarded as indicating clearly that Congress intended a civil and not a criminal sanction. *Id.*, pp. 402-404. Again, that decision recognizes that the fact that the several liabilities or sanctions are separately, successively, and distinctly stated—as in the statute here involved—"helps to make clear the character" of those involved as civil and criminal respectively. *Id.*, p. 404.

In *United States* v. *Griswold*, 24 Fed. 361, sustaining a *qui tam* action under R. S. sec. 5438, the court specifically held (p. 366): "The statute is a remedial one."

III

The Remaining Questions Raised by Respondents Are Without Merit

Respondents refer to an old statute requiring the consent of Treasury officials for the institution of suits "for the recovery of taxes, or of any fine, penalty, or forfeiture" (Resp. Br. 97). However, that provision is derived from a statute predating the creation of the Department of Justice and reflecting an era when the Solicitor of the Treasury was—in connection with public litigation in the courts—what the Attorney General is today.[7] By the statute here involved, moreover, Congress manifestly intended that private parties be authorized to bring suit without consent of public officials; that was the very purpose of the statute, as set forth in Point I above; and, if such consent be now

[7] Since the Government has referred to a history of the Department of Justice (Gov't Br. pp. 15-16), petitioner may be justified in referring to the same work wherein it is stated that, despite the creation of the Department of Justice, "old statutes had not been expressly repealed and had found places in the Revised Statutes, the compilation of which had been authorized and begun before the creation of the Department of Justice." Cummings and McFarland, Federal Justice, p. 488.

held requisite, the very purpose of the statute is nullified. Respondents also (Br. 99) refer to Executive Order No. 6166 of June 10, 1933, shifting governmental functions between federal agencies and transferring—or confirming—the prosecution of "claims" to the Department of Justice. The court below has fully set forth one of the reasons why it, as well as R. S. sec. 3214, can have no effect upon the statute here involved (R. 481-483).

Respondents next attempt to show that no damage was shown by the evidence (Br. 103-109). The gist of their argument is that the municipalities actually spent on the project an extra amount greater than the damage proved (they specify only 3 of the 56 projects), and that therefore the damage must be taken to have been paid solely by the sponsors in connection with each project. The answer, however, is clear enough. The sponsors, as the work progressed, may have added to the construction or have otherwise incurred any amount of additional expense; and respondents merely ask this Court to assume that all additional expense—above the original estimated cost of the project in which alone the Government agreed to share the expense—must be allocated to the payment of excessive costs brought about by respondents' fraud. In short, their damage argument is merely another method by which respondents seek—under cover of the municipality—to immunize themselves from liability to the United States. Unless the statute is to be defeated, the orthodox rule of damages, apportioned according to the percentage the United States had agreed to contribute, should be followed as was done here. *People* v. *Stephens*, 71 N. Y. 527, 559; *West Homestead Borough* v. *Erbeck*, 239 Pa. 192, 86 Atl. 773. The sole evidence is that such rule accurately measures the actual loss of the United States (R. 506, 520). Indeed, the respondents later in their argument admit that the rule applied is proper, saying: "We have raised no question about that being the proper measure of damages."

(Resp. Br. 109.) The jury found damage (R. 338). Neither of the courts below accepted respondents' argument, and the circuit court of appeals very properly held that by respondents' acts "the government was defrauded in that it was compelled to contribute more for the electric work * * * than it would have been required to pay had there been free competition in the open market" (R. 472).

Respondents' next argument, that they were entitled to show "the actual cost of doing the electrical work on the projects in question" (Br. 110-113), is likewise unsound. The question here is not what costs respondents incurred, but what a reasonable, free, open, and non-collusive bid would have been as of the time of the bidding. *People* v. *Stephens*, 71 N. Y. 527. In common sense, what respondents spent—in an aura of rigged bidding and exorbitant profits—is immaterial. To adopt any such rule would lay a premium upon fraud and assure the fraudulent that their actual expenditures will always be safeguarded. The rule, as stated above in the previous paragraph, is to the contrary.

Respondents complain that character evidence was excluded (Br. 114). This argument is expressly founded, and can only be founded, upon the theory that the fixed sum recoveries here involved are penal in character. *Thompson* v. *Bowie*, 4 Wall. 463, 471; *Quinalty* v. *Temple*, 176 Fed. 67, 69 (C. C. A. 5.) But that no part of the recoveries here involved are penal is fully set forth in Point II(B), *supra*.

Respondents argue that counsel for petitioner improperly referred to the prior criminal proceedings, in his argument to the jury in this case (Br. 115-116). But respondents themselves injected this fact into the case in their opening statement to the jury and in their summation at the conclusion of the trial (R. 384-385).

Respondents conclude with an argument that only one fixed sum recovery—$2,000 and no more—should be permitted against, and apportioned among, them no matter how

many fraudulent I-23 statements or non-collusion certificates they may have submitted and no matter how many projects and contracts were involved. But each submission of a fraudulent I-23 statement by respondents constitutes a separate claim and hence a separate item of liability. *Blockburger* v. *United States*, 284 U. S. 299, 303; *Ebeling* v. *Morgan*, 237 U. S. 625, 629. However, the trial court refused to allow a fixed sum recovery for every such submission and instead allowed one only for each separate contract or project. Petitioner took no cross appeal to the court below and of course cannot raise the point here in order to increase the number of fixed sum recoveries. But plainly the allowance of the fixed sum recovery for each project or contract is proper. Any other rule would be putting a premium upon continuing conspiracies, as respondents here seek to have this Court do. Moreover, only the third clause of the statute here involved includes conspiracy as an element; but each clause includes "claims" as an element. Even if the liability here be confined to the third clause of R. S. sec. 5438 involving conspiracy, that clause also includes "any agreement"; and the respondents here entered into an "agreement" respecting each bidding on each contract. Finally the statute expressly states that "*any person* • • • who shall do or commit any of the acts prohibited by any of the foregoing provisions • • • shall forfeit and pay to the United States the sum of two thousand dollars" (12 Stat. 696, 698); here there were 55 defendants (R. 1, 338); and thus by the terms of the statute, even under respondents' argument there should be at least 55 separate fixed sum recoveries in the sum of $110,000 rather than the mere $2,000—or $36.36 each—for which respondents contend.

Respectfully submitted,

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December, 1942.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 173.

UNITED STATES OF AMERICA EX REL. MORRIS L. MARCUS and MORRIS L. MARCUS in his own behalf, Petitioners,

v.

WILLIAM F. HESS ET AL.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

ARGUMENT.

I.

No Special and Important Reasons for Granting Certiorari.

There are, we respectfully submit, no "special and important reasons", to use the language of Rule 38 paragraph 5 of this Court, why a certiorari should be granted in this case. The Government does not want a certiorari. The Government, appearing through its Assistant Attorney General as an *amicus curiae* in the Circuit Court of Appeals (R. 467), said that "any attempts of private individuals to recover on claims due and owing to the United States and to usurp the duties of the duly ap-

pointed officers of the United States in the collection of such claims is a matter of grave concern to the Government", and asked that the judgment of the District Court "be reversed" and "that the action be dismissed".[1] At the oral argument in the court below the learned Assistant Attorney General stated that the reason the Government had intervened was because the danger of such suits as this was proving to be an impediment to the war production program. There is, therefore, contrary to the petitioner's insinuation (p. 12), no public policy or purpose why *qui tam* suits such as this should be encouraged because of the war in which we are now engaged. The Government, through its Department of Justice, District Attorneys and other officials, is now well able to protect its domestic rights, and is inherently in a better position to judge what action should be taken to enforce its rights than a private individual, like the relator, who informed the Government of nothing, who simply paraphrased, in bringing this suit, the averments of the public indictments which had already been obtained by the regular attorneys for the United States against the respondents, and who had no personal reason or incentive for bringing this action, except the hope of enriching himself at the expense of unfortunate fellow citizens who, for the most part at least, were reluctantly forced into a practice contrary to law. Nor do we find that "The pressing need for such a remedy for this specific evil has been recently recognized in this Court" in *U. S. v. Cooper Corp.*, 312 U. S. 600, 614, as stated by petitioner (p. 24). And, as stated by the court below (R. 479, 127 F. (2d) 237), its decision does not bar recovery by the United States or the municipalities concerned of any damage actually suffered by them. The United States has a common law right to recover any

1. Petition and brief of the United States as *amicus curiae* in Circuit Court of Appeals, pp. 1, 2, 5, 15.

money of which it has been defrauded entirely independent of R. S. § 3490[2]: *Pooler v. U. S.*, 127 Fed. 519, 521. Admittedly, the municipalities can maintain suits against the respondents.

The Circuit Court of Appeals was composed of three able judges: Clark, Jones and Goodrich, JJ. The decision was unanimous. The opinion of the Circuit Court of Appeals, after certain inadvertent stenographical errors therein were corrected (R. 487), reads well, logically and convincingly. The corrected opinion appears in 127 F. (2d) 233. The opinion of the Circuit Court of Appeals in this case has already been followed by the Circuit Court of Appeals for the Fifth Circuit in the parallel case of *U. S. ex rel. Ostrager v. New Orleans Chapter, Associated General Contractors*, 127 F. (2d) 649. As will be seen from the opinion of the Circuit Court of Appeals for the Fifth Circuit in the *Ostrager* case, *supra*, it adopted the reasoning of the court below in the instant case and based its judgment dismissing that action wholly upon that reasoning, viz., that such a case as this is not authorized by R. S. § 3490 because the defendants did not have any claim against the United States, which is a necessary ingredient of liability under the statute.

There is no conflict among any of the lower federal courts upon any question involved. All of the decisions are in accord with the decision which this Court is asked to review:

U. S. ex rel. Ostrager v. New Orleans Chapter, Associated General Contractors, 127 F. (2d) 349 (C. C. A. 5);

U. S. ex rel. Olson v. Mellon, 4 F. Supp. 947, affirmed *sub nomine U. S. ex rel. Knight v.*

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2. This section and the other statutes pertinent to this case are in the record (R. 407-419).

Mellon, 71 F. (2d) 1021 (C. C. A. 3) cer. den. 293 U. S. 615;

U. S. ex rel. v. Mercur Corp., 13 F. Supp. 742, affirmed 83 F. (2d) 178 (C. C. A. 2) cer. den. 299 U. S. 576;

U. S. ex rel. v. Salant, 41 F. Supp. 196 (D. C. N. Y.);

U. S. v. Shapleigh, 54 Fed. 126 (C. C. A. 8);

Mandel v. Cooper Corp., 42 F. Supp. 317 (D. C. N. Y.);

U. S. ex rel. Brensilber v. Bausch & Lomb Optical Co. et al. (unreported) (D. C. N. Y., Civ. No. 17-11, decided January 16, 1942);

U. S. ex rel. v. Kansas Pacific Ry. Co., 26 Fed. Cas. No. 15,506 (D. C. Kan.);

U. S. ex rel. v. American Cotton Cooperative Ass'n. (unreported) (D. C. N. Y., L 58-272, decided May 20, 1935);

U. S. ex rel. v. McMurtry, 5 F. Supp. 515 (D. C. Ky.);

Mookini v. U. S., 95 F. (2d) 960 (C. C. A. 9);

Salas v. U. S., 234 Fed. 842 (C. C. A. 2);

Capone v. U. S., 51 F. (2d) 609 (C. C. A. 7) cer. den. 284 U. S. 669.

The petitioner says (p. 14) that the decision below "is in conflict with decisions of the circuit courts of appeals for other circuits", citing *Madden v. U. S.,* 80 F. (2d) 672; *Langer v. U. S.,* 76 F. (2d) 817; and *U. S. v. Harding,* 81 F. (2d) 563. In *none* of those cases, nor any other case cited by petitioner, was a recovery sustained under R. S. § 3490, the informer statute on which the case at bar is expressly based (R. 5). Indeed, *none* of said three cases cited by petitioner even involved R. S. § 3490 or the incorporated § 5438 and there is no conflict

between those cases and the decision of the Circuit Court of Appeals in the instant case. The cases cited by petitioner were not informer actions, but purely criminal prosecutions based upon statutory provisions which cannot be invoked to maintain the present case. Thus, *Madden v. U. S., supra,* was a prosecution under § 28 of the Criminal Code (18 USCA § 72). The essence of the crime defined by § 28 of the Criminal Code is forgery. Section 28 of the Criminal Code, of course, is not incorporated into R. S. § 3490. In *Langer v. U. S., supra,* the appellants were convicted under § 37 of the Criminal Code, but on appeal the judgment was reversed because the only employees assessed were those of the State and not of the Federal Government or any of the latter's agencies, and, therefore, there was no violation of any federal statute. What the petitioner quotes from this case is, therefore, dictum. More important than that, however, is the fact that this decision is based wholly on § 37 of the Criminal Code, which makes a crime of any conspiracy to obstruct the administration of any federal statute or governmental function, regardless of whether the Federal Government has sustained any pecuniary loss (see 76 F. (2d) p. 824). Section 37 of the Criminal Code is not incorporated into R. S. § 3490 and cannot support the present action. *U. S. v. Harding, supra,* also involved an indictment under § 37 of the Criminal Code (18 USCA § 88), the general conspiracy provision. The indictment was held to charge an offense because the defendants had allegedly conspired to hinder the United States "in its rights, operations and functions" (see 81 F. (2d) p. 567). This decision is based wholly on § 37 of the Criminal Code which, as above stated, makes a crime of any conspiracy to obstruct the administration of any federal statute or governmental function, regardless of whether the Federal Government has sustained any pecuniary loss. Section 37 of the Criminal Code is not incorporated into R. S. § 3490, upon

which the case at bar is expressly based, and cannot, therefore, support the case at bar. The cases cited by petitioner are distinguished by the court below in its opinion (R. 478, 127 F. (2d) 236). The petitioner's statement (p. 17) that "The holding of the court below presents a conflict with these decisions", referring to the ones cited in this paragraph, is, therefore, clearly in error. The decisions in cases involving R. S. § 3490 and the incorporated provisions of R. S. § 5438 are all in accord.

This Court has refused to grant a certiorari in every case under R. S. § 3490 which it has heretofore been asked to review: *U. S. ex rel. Knight v. Mellon*, 293 U. S. 615; *U. S. ex rel. Kessler v. Mercur Corp.*, 299 U. S. 576. There is no good reason, we respectfully submit, why any different policy should be applied to the so-called informer who is the present petitioner.

II.

No Statutory Authorization for This Suit.

1. *Informers are not favored.*

In addition to the cases cited by the court below for the rule that *qui tam* actions are regarded with disfavor, Mr. Justice Brewer, when a Circuit Judge, said of an informer who brought a *qui tam* action in *Taft v. Stephens Lith. & Eng. Co.*, 38 Fed. 28, 29:

> "Plaintiff is not suing for the value of his services, or for injury to his property, but simply to make profit to himself out of the wrongs of others; and when a man comes in as an informer, and in that attitude alone asks to have a half million dollars put into his pocket, the courts will never strain a point to make his labors light, or his recovery easy."

2. *R. S. § 3490 is to be construed strictly.*

R. S. § 3490[3] is penal in nature and must, therefore, be strictly construed. To that effect in *Olson v. Mellon, supra,* Judge Gibson, whose opinion was adopted by the Circuit Court of Appeals and a certiorari refused by this Court, said (p. 949):

> "Counsel for the plaintiffs have contended that sections 3490, 3491, Rev. St., are remedial statutes, and, as such, are entitled to a quite liberal construction, as opposed to the strict construction to be given a penal statute. With this contention we are unable to agree. *The statute is plainly penal in its nature, and is not to be enlarged by implication;* and, unless it be so enlarged, no statutory authority exists for plaintiffs' suits." (Italics added)

In *U. S. ex rel. v. Kansas Pacific Ry. Co., supra,* the court said of R. S. § 3490 (p. 680):

> "The law under which this suit is brought being a penal statute, it should not be enlarged by implication, but should be strictly construed."

To the same effect are *U. S. v. Shapleigh,* 54 Fed. 126, 129-130, 134; *Pooler v. U. S.,* 127 Fed. 519, 521; *Ferrett v. Atwill,* 8 Fed. Cas. No. 4,747, p. 1163; and others.

3. *R. S. § 5438 applies only to false claims "upon or against the Government of the United States, or any department or officer thereof" made or presented by the defendant, alone or jointly with others.*

That the provisions of R. S. § 5438, incorporated into R. S. § 3490, apply only to cases in which the defendant has made or presented a false, fictitious or fraudulent claim upon or against the Government of the

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3. This section is printed in the record (R. 407).

United States or a department or officer thereof, based on the Government's own liability to the claimant, was conceded by the relator in the courts below[4] and is the construction which has been uniformly placed upon this informer statute in every case in which it has been considered, without any exception whatever. Thus, in *U. S. ex rel. v. Mercur Corp.*, 13 F. Supp. 742, the Honorable Robert P. Patterson, then a District Judge of the Southern District of New York, afterwards a Circuit Judge and now Assistant Secretary of War, in dismissing an informer's complaint based on R. S. § 3490 because the suit was not within the purview of that section and the incorporated provisions of R. S. § 5438, said (p. 743):

> "An informer's action will therefore lie *only* in cases where the defendant has made false, fictitious, or fraudulent 'claim upon or against' the Government of the United States. This means a claim for money or property 'to which a right is asserted against the Government, based upon the Government's own liability to the claimant.' United States v. Cohn, 270 U. S. 339 . . ." (Italics added)

The Circuit Court of Appeals for the Second Circuit affirmed: 83 F. (2d) 178. The Circuit Court, by Judge Augustus Hand, said (p. 181):

> "The question before us is whether the amended complaint and the lease and agreements which it incorporates show that the defendants, or any of them, were guilty of presenting a false claim against

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4. Thus in the "Brief for Appellees" filed by relator in the court below the heading of the portion of his brief dealing with the meaning and scope of the informer's act was as follows (p. 21): "The Informer's Act Applies to the Making of False Claims Against the United States Government or any Department or Officer, as Well as Against the Property of the Government or any Department Thereof." Relator below made no attempt to construe the statute differently. His reference to a claim against the property of the Government was based on *U. S. ex rel. Kessler v. Mercur Corp., supra*, and is answered in this brief at p. 14.

the United States for the purpose of obtaining payment or approval thereof. . . .

In order to bring a case within the statute we have referred to, it is necessary to show that a claim is presented against the United States, or in rem against its property. This interpretation of the statute is so entirely settled as to be beyond any question."

This Court denied a certiorari: 299 U. S. 576.

In *Olson v. Mellon*, 4 F. Supp. 947, which was also an informer's action based on R. S. § 3490, Judge Gibson in holding that the case was not authorized by the statute said (p. 948):

"It will be noted that section 5438, R. S., related only to *false claims against the United States*, and was not wide enough, in its original form, to include the suppression of material matters in an income tax return." (Italics added)

The Circuit Court of Appeals affirmed on Judge Gibson's opinion: *U. S. ex rel. Knight v. Mellon*, 71 F. (2d) 1021. This Court denied a certiorari: 293 U. S. 615.

Other cases to the same effect are *U. S. ex rel. v. Salant*, 41 F. Supp. 196, 197; *U. S. ex rel. v. McMurtry*, 5 F. Supp. 515; *U. S. ex rel. v. American Cotton Cooperative Ass'n.* (L 58-272, U. S. D. C., S. D. N. Y.)[5]; *U. S. v.*

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5. This is an unreported case brought under R. S. § 3490, charging that large sums which had been paid to the Cotton Stabilization Corporation and the Grain Stabilization Corporation by the Federal Farm Board out of the revolving fund provided by Congress in the Agricultural Marketing Act were fraudulently obtained by the defendants through various conspiracies, misrepresentations, concealments, falsifications of bills, invoices, warehouse receipts and book entries and the like. The action was dismissed because not authorized by the informer's act. The opinion in that case was written by Judge Knox, now Senior District Judge of the Southern District of New York. A copy of Judge Knox's opinion is in the record (R. 432-433).

Cohn, 270 U. S. 339, 345-346; *Mookini v. U. S.*, 95 F. (2d) 960, 961; *Salas v. U. S.*, 234 Fed. 842; and *Capone v. U. S.*, 51 F. (2d) 609, 614.

The uniform construction placed upon the provisions of R. S. § 5438, which are incorporated into R. S. § 3490, confining it to cases in which the defendant, either alone or jointly with others, has made or presented a false claim against the United States Government, based upon the Government's own liability to the claimant, is right, particularly in view of the strict construction to which this informer's act is subject. Each clause of R. S. § 5438, except those at the end relating to misappropriation of military property, makes a criminal offense of certain acts when done in conjunction with the presentation of a false claim against the Government of the United States or any department or officer thereof. Thus the first clause specifies a false, fictitious or fraudulent "claim upon or against the Government of the United States, or any department or officer thereof." The second clause does the same, by the words "such claim", and the third and last clause also clearly means a false claim upon or against the Government of the United States or a department or officer thereof, for the offense is conspiracy to defraud "the Government of the United States, or any department or officer thereof" by obtaining the payment or allowance of a false claim. The gravamen of the third clause was not any conspiracy to defraud the United States by any false claim against anyone, as contended by petitioner (petitioner says [p. 23]: "The third clause of R. S., sec. 5438, is directed at any form of joint action 'to defraud the Government of the United States.'") for that was the substance of another section of the Revised Statutes, § 5440, now § 37 of the Criminal Code (18 USCA § 88)—the general conspiracy section under which the respondents were indicted, pleaded *nolo contendere* and were fined (R. 294-300). Here again the petitioner seeks to

interpret the statute liberally, when as shown by the cases heretofore cited (pp. 6-7) the act is to be strictly construed against an informer. The purpose and intent of the third clause, it is submitted, was to make a crime of a combination or conspiracy by two or more to do what was made a crime by the preceding two clauses when done by a single individual, viz., the making of a false claim, as the context shows, against the United States or any department or officer thereof. The plain language of R. S. § 5438, therefore, precludes its application to a false or fraudulent claim upon or against a local municipality, like a county, city or borough of one of the states.

It being, therefore, established by all of the cases, and it also appearing from consideration of the statutory language and history, that in order to be liable under R. S. § 3490 the defendant must have made a false *claim against the Government of the United States or some department or officer thereof,* it remains only to apply that law to the facts of the case at bar. The defendants had no contract with the Government of the United States, nor with any department or officer thereof. Neither the Government of the United States nor any department or officer thereof promised to pay the defendants anything for their electrical work. How then could the defendants have "any claim upon or against the Government of the United States, or any department or officer thereof"?

It is not sufficient under the provisions of R. S. § 5438, which are incorporated into R. S. § 3490, that the defendants make or present claims for payment or approval to an officer in the civil, military or naval service of the United States, knowing such claims to be false, fictitious or fraudulent, *unless also those claims are "upon or against the Government of the United States, or any department or officer there-*

of." In the case at bar, the only claims which the defendants had and, therefore, could present, were against the local municipalities, which alone had promised or contracted to pay them (R. 274). That the contracts with the defendant electrical contractors were simply two-party contracts between the local municipality, as one party, and the electrical contractor, as the other party, and that neither the United States of America nor any of its departments, officers or agencies was a party to said contracts, clearly appears from those contracts and is beyond dispute (R. 274). The contracts are signed only by the electrical contractor and officers of the local municipality (R. 276). Incidentally, it may also be noted that the advertisement for bids was solely by the local municipality (R. 217-218), the bids were addressed exclusively to the local municipality (R. 225) and the performance bonds run alone to the local municipality (R. 277, 279). Everything is consistent with the whole liability for paying the contractor being solely on the local municipality.

Consequently it is immaterial that the I-23 forms *i. e.*, the periodical estimates for partial and final payment, were presented to and approved by a PWA resident engineer inspector before they were paid.[6] Nor is it material that the PWA approved the plans and specifications, contracts, changes and the like, exercised

6. Each payment to every contractor was made by the local municipality which had contracted with him, by check or draft signed solely by officials of the local municipality, drawn on bank accounts in the name of the municipality and subject to check only by officials of the local municipality and not by the PWA or any officer of it (R. 44, 45-46, 57-58, 60-68, 70, 74, 76, 81, 85, 89-90, 95-98, 100-101, 103-104, 106-108, 114). The local municipality could, if it wished, pay the contractor the full amount of the periodical estimate for the work done during the previous month, notwithstanding some qualification or exception to the certification of the PWA inspector thereon (R. 62), and sometimes in fact actually did pay the contractor the full amount of the periodical estimate, notwithstanding that the PWA inspector had excepted one or

some watch over the construction of the improvements, audited the accounts relating to payment for the projects or did any of the other things which the relator has mentioned, because none of those acts resulted in giving the defendants "any claim upon or against the Government of the United States, or any department or officer thereof."

Assuming that there was no fraud whatever in the transaction, if one of the defendants who has not been paid in full, of whom there are several, sued the Government of the United States, or any department or officer thereof, for the balance of his contract price, would any court permit a recovery? Unless that question can be answered in the affirmative, notwithstanding that only the local municipalities ever contracted to pay the defendants, the case at bar is not authorized by R. S. § 3490 and the judgment of the Circuit Court is right.

What is meant by a claim against the United States was clearly defined by this Court in *Hobbs v. McLean*, 117 U. S. 567, 575, as follows:

> ". . . there was no claim against the United States to be transferred. Peck had at that time no contract even with the United States, and there was no certainty that he would have one. What is a claim against the United States is well understood. *It is a right to demand money from the United States.* Peck acquired no claim in any sense, until

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more items thereon from his certification (R. 101, 108-109). An instance of this kind is shown by the periodical estimate (I-23 form) which is included in the record (R. 202-207) and the warrant or draft of the West View School District in payment of that periodical estimate (R. 208, both parts of Ex. 245). Under the heading "Remarks" at the end of this periodical estimate, it will be seen that the PWA inspector expressly excepted one item from his certification because it entailed a change which had not been approved by the PWA (R. 207). Nevertheless, the School Board's draft was for $1,562.39, the same amount as the total shown due by said periodical estimate (R. 205, 208).

after he had made and performed, wholly or in part, his contract with the United States." (Italics added)

In the light of the foregoing language of this Court, it is clear that the defendants never had any claim against the United States or any department or officer thereof, *because they never had any contract with any of them.*

Nor did the defendants ever have any claim, *in rem* or otherwise, against the property of the United States Government. The only claim of the defendants grew out of the promise contained in their contracts with the local municipalities that the local municipalities would pay them a certain sum of money for doing the electrical work on each project (R. 274). These claims were purely against the local municipalities, *in personam*. No specific dollars or fund was prescribed by the defendants' contracts for their payment. Where the local municipalities obtained the funds to pay the contractors upon performance by the latter of their part of the contracts was immaterial as between the local municipalities and the contractors. Against what property of the Federal Government could the contractors possibly have maintained a proceeding *in rem?* Not against the money received by the local municipality by way of a grant from the PWA and deposited in the "construction account" along with other funds of the local municipality, because there is no legal principle or basis to our knowledge, and none has been suggested by the relator, by which the defendants could have enforced any claim *in rem* against that fund. The claims of the defendants were simply *in personam* against the local municipalities, like any other contractual claim to collect a promised sum of money for certain services: *Kline v. Burke Construction Co.*, 260 U. S. 226, 228.

The construction placed upon the informer act, R. S. § 3490, by the Circuit Courts of Appeals for the Second, Third and Fifth Circuits and by the other courts in the cases cited by us does not emasculate or nullify the statute, as contended by petitioner. The statute as construed by the courts applies to any person who, either singly or in confederation with others, presents a false, fictitious or fraudulent claim upon or against the Government of the United States, or any department or officer thereof, based upon the Government's own liability to him. Thus, ample room is left for the statute to operate.

4. *No falsity in any claim.*

Even if, let us assume for the sake of argument only, the case would otherwise come within the purview of R. S. § 3490, still we submit that no "false, fictitious, or fraudulent" claim was presented for payment or approval, because the claims were strictly in accordance with the existing written contracts on the respective jobs, to receive the amounts agreed in said contracts to be paid. There is no contention that the respondents did not furnish the electrical installations on the respective jobs in full accordance with their contracts. This is not a case in which defendants, having contracts with the United States Government under which the former were to furnish services or materials to the Government, presented claims for payment or approval, falsely representing that they had furnished the services or the materials, when in fact they had not done so. Such a case would come within the purview of R. S. § 3490 and the incorporated provisions of § 5438. The illegality in the case at bar occurred in the bidding, resulting in the price agreed in the subsequent contract to be paid for the work being higher than it otherwise would have been, but there was no false or fraudulent misrepresentation in the periodical estimates for partial and final payment

nor was there any fraud or collusion in the presentment or approval of said periodical estimates (the I-23 forms). There was no falsification or fraud in anything which occurred after the contracts were executed. The municipalities received the electrical installations in accordance with their contracts, and they paid the contractors exactly what the contracts called for and no more. The claims for payment were for proportions of the agreed contract price as the work progressed, and the whole of the claims just equalled, and did not exceed, the price stipulated in the contracts to be paid. We, therefore, submit as an alternative reason why this case does not come under R. S. § 3490 and the incorporated provisions of § 5438, that the claims presented for payment or approval were not "false, fictitious, or fraudulent", as required by the statute.

This position is fully supported by the recent decisions in *Mandel v. Cooper Corp.*, 42 F. Supp. 317, and *U. S. ex rel. Brensilber v. Bausch & Lomb Optical Co. et al.*, the latter being an unreported case decided by the District Court for the Southern District of New York on January 16, 1942. Both of those cases were also informer actions brought under the same statutory provisions as the case at bar. Both cases were dismissed for failure to state a cause of action under R. S. § 3490 and the incorporated provisions of R. S. § 5438. In the *Mandel* case the complaint alleged that the defendants, which included all of the large tire companies, had defrauded the United States Government by collusive bidding to supply the rubber tire requirements of the Government and that the Government, therefore, had entered into contracts to pay, and had paid, substantially higher prices for its tire requirements than it would have in open and fair competition. Holding that the suit was not authorized by the statute in question, Judge Coxe said (p. 319):

> "The present action sounds in tort. It really is an action for damages for alleged fraudulent representations in the procurement of contracts to supply the tire requirements of the Government during the periods in question. It is not an action for damages sustained by the Government by reason of the presentation for payment or approval of fraudulent claims within the meaning of the informer statute."

The *Brensilber* case was a similar action, charging collusion in submitting bids to the United States Government for military optical instruments. No opinion was written in that case. Instead, we are advised that the court dismissed the action from the bench immediately after the argument and granted summary judgment in favor of the defendants. The court referred orally to the opinion in *Mandel v. Cooper Corp., supra.*

The statute upon which this action is predicated requires the claims which are made or presented to be false, fictitious or fraudulent. No such claims were made or presented in this case. This disposes of petitioner's arguments under the first and third clauses of R. S. § 5438.

5. *No false certificate or claim made by respondents to aid municipalities in getting PWA funds.*

In his petition for certiorari (pp. 19-22) the petitioner for the first time contends that he has a cause of action under the second clause of R. S. § 5438. His argument is that the certificates of non-collusion which sometimes accompanied the bids and the periodical estimates on the I-23 forms which the contractors submitted to the local municipalities for periodical and final payment were for the purpose of aiding to obtain the payment or approval of the requisitions of the municipali-

ties upon the United States. A question not raised below should not be considered on appeal: *Duignan v. U. S.*, 274 U. S. 195, 200. The Circuit Court decided the question whether this case was authorized by the informer's statute precisely as the question was framed and presented to it by both sides, and new contentions such as petitioner now makes under the second and third clauses of R. S. § 5438 should not constitute a basis for reviewing the decision of the court below. But aside from that principle, this novel afterthought of the petitioner is unsound.

In the first place, as shown under the previous point in this brief (pp. 15-17), the periodical estimates for partial and final payment on the I-23 forms which were submitted, usually monthly, by the contractors to the local municipalities and which were used in conjunction with the payments by the local municipalities to the contractors did *not* "contain any fraudulent or fictitious statement or entry". The second clause of R. S. § 5438 expressly requires the document involved "to contain [a] fraudulent or fictitious statement or entry" (R. 409). The periodical estimates merely showed the proportion of the contractor's work performed during the preceding month, in order that he might receive that proportion of the lump-sum price specified in the written contract previously entered into between him and the local municipality (see Ex. 245, R. 202-207). There is no evidence, and there was no contention below, that the periodical estimates for partial and final payment on the I-23 forms, also sometimes referred to by petitioner as "claims", contained "any fraudulent or fictitious statement or entry". No "fraudulent or fictitious statement or entry" in those I-23 forms is pointed out in the petition and none could be. The main document upon which the petitioner relies for his contention now under examination, therefore, clearly fails to fulfill the statutory

requirement and may be eliminated from further consideration.

As for the certificates or affidavits of non-collusion which sometimes, but not always[7], accompanied the bids to the local municipalities, no such certificates or affidavits were required by the contract between the PWA and the local municipality (Ex. 22 and 76, R. 157-184), or by any regulation or law; when required by the local municipality they were, in many instances at least, kept by the local municipality and not shown to the PWA (R. 49, 51-52); when a copy of them was included in the contract documents which were submitted to the PWA for approval, the PWA's approval did *not* apply to the certificate or affidavit of non-collusion, because the approval of the PWA was limited to the contract being in conformity with the agreement between the applicant (i. e., municipality) and the United States (R. 217), which latter agreement did *not* require any certificate or affidavit of non-collusion in bidding but was largely devoted to requirements regarding the hiring and compensation of labor (Ex. 22 and 76, R. 157-184); the certificates and affidavits accompanied the *bids* and were *not* "for the purpose of obtaining or aiding to obtain the payment or approval of [any] claim" upon or against the Government of the United States or any department or officer thereof, as expressly required by the second clause of R. S. § 5438; and there is *no evidence* whatever that the certificates or affidavits of non-collusion in bidding influenced or motivated the PWA in paying its agreed grant to the local municipalities in the four installments as the work progressed as provided in the

7. Relator in his petition (p. 7) says that there were statements or certificates of non-collusive bidding on all projects involved herein, with the exception of the Pittsburgh Municipal Airport Project. That is not correct. Reference to Ex. 626 will prove that there was no such statement or certificate on the North Park Bath House Project. Others could be added.

contract between the PWA and the local municipalities (Ex. 22, R. 160-163). In those instances in which no certificates or affidavits of non-collusion in bidding existed, it is obvious that the PWA could *not* have been influenced or motivated by any such certificates or affidavits in paying to the local municipalities the funds which it had promised the local municipalities to assist them in constructing those projects.

The relator says in his petition (p. 20) that "The evidence further showed that they were included in the Government audit and relied upon by the administrative officers of the Government in acting upon the municipalities' requisitions of federal funds to be placed in the Construction Account." No record reference to any supporting evidence is given by the petitioner. If the pronoun "they" in the sentence quoted from the petition is intended to include the certificates of non-collusive bidding, the petitioner's statement is positively wrong and contrary to fact. There is absolutely no evidence that those certificates were included in the Government audit or that they were relied upon by the administrative officers of the Government in acting upon the municipalities' requisitions of federal funds to be placed in the construction account. It would have been physically impossible for any such certificates to have been included in any Government audit or relied upon by any administrative officers of the Government in acting upon any requisitions by municipalities of federal funds in the instances in which no such certificates were made or existed, and yet the construction account was audited and the municipalities' requisitions honored in those instances just the same as in the cases where such certificates accompanied the contractors' bids. Moreover, one-third of the PWA grant, known as the "Advance Grant", could be, and usually was, paid to the municipality before bids were even solicited from the contractors (Ex. 22, R. 160).

Also contrary to petitioner's statement, in the last paragraph of his footnote No. 5 (p. 10), it does not follow from the fact that the PWA suspended payment of part of its grants to the local municipalities, when its investigators discovered the illegal bidding by the electrical industry in Pittsburgh, that the certificates of non-collusion which sometimes accompanied the bids were "a material part of the documents considered in passing on the question of payment by the United States under the grant in each case." The suspension of payments by the Government resulted wholly from the Government's discovery that the bidding had been collusive, which would be true or not regardless of whether a certificate of non-collusive bidding had accompanied the bids on any given project or not. There is no evidence or intimation anywhere that the PWA's suspension of payments to the local municipalities was in any way due to any certificates of non-collusive bidding and the PWA would doubtless have suspended grant payments exactly as it did upon discovery of the illegal bidding even if no non-collusion certificate or affidavit had ever existed. Indeed, the explanation by the PWA for its suspension of grant payments, referred to by petitioner in said footnote, supports the position of the respondents, because it was that a certain amount had been suspended "pending action by the Owner regarding collusive bidding on [the electrical] contract" (R. 215), the term "Owner" referring to the local municipality (R. 49-51). Similar explanations will be found with reference to suspended portions of grants on other projects (R. 47-48, and see Ex. 150, R. 195). The Government thereby indicated its opinion to be, as the respondents contend, that the right of action against the electrical contractors is in the local municipalities.

The second clause of R. S. § 5438 specifically requires that the document in question must have been made by the defendant "for the purpose of obtaining or

aiding to obtain the payment or approval of such claim", meaning as conceded in the petition for certiorari (pp. 11-12) a claim "upon or against the Government of the United States." The certificates or affidavits of non-collusion in bidding did not exist as to all projects, and even where they did exist were *not* made, or used, for the purpose of aiding the municipalities to obtain from the United States Government what the latter had already agreed to grant the municipalities. Consequently, the only other document relied upon by the petitioner to make out a cause of action under the second clause of R. S. § 5438 also fails to satisfy the statutory qualifications, particularly when they are strictly construed as they should be.

Furthermore, it is respectfully submitted that the claim against the United States Government, in order to come within the purview of the informer's act, must be "false, fictitious or fraudulent." The claims of the local municipalities against the United States Government certainly could not be described as "false, fictitious or fraudulent." They contained no false, fictitious or fraudulent statement. Each was in strict accord with the pre-existing written contract between the local municipality and the United States. None called for any more than the amount which the United States had agreed in said preexisting contract to give the municipality to assist it in financing what it cost the municipality to construct the project. For the alternative reason stated in this paragraph, therefore, it is also respectfully submitted that the relator made out no case under the second clause of R. S. § 5438.

U. S. v. Coggin, 3 Fed. 492 and *U. S. v. Strobach*, 48 Fed. 902, cited by petitioner on the point under consideration, both were criminal cases in which the defendant personally had presented a fraudulent claim directly against the United States Government, for payment di-

rectly out of the United States Treasury, and each claim was based on the Government's own alleged liability to the claimant. Those cases, therefore, will not support the present action.

6. *Right of action is in local municipalities.*

Entirely aside from and independent of the informers act, it is well settled that a donor who gives money to a donee, either for a specific purpose or otherwise, has no cause of action against a third party who defrauds the donee out of some of the money. There is no privity of contract between the donor and the third party. The right of action in such a case is solely in the donee. Some cases in support of this proposition are *Cooper v. Roberts,* 59 U. S. 173; *Alabama v. Schmidt,* 232 U. S. 168; *Church v. Swetland,* 243 Fed. 289; *George v. Thompson,* 285 Fed. 902; *Plews v. Burrage,* 19 F. (2d) 412; *China Fire Ins. Co. v. Davis,* 50 F. (2d) 389; and *Myers v. Centers,* 171 Ark. 1005, 287 S. W. 189.

In this connection the terms of the offers from the PWA to the local municipalities should be noted. The gist of them is that the Government "offers to aid in financing the construction of" a specified improvement *"by making a grant to" the local municipality* (see Ex. 76, R. 179). The noun "grant" is defined in *Webster's New International Dictionary* (1939) as the "Act of granting" or as the "Thing or property granted; gift; boon". The verb "grant" is defined as follows:

> "To bestow or confer, with or without compensation, particularly in answer to prayer or request; to give.
>
> . . . . . .
>
> To give or bestow formally, usually in answer to a petition, as a privilege; to make conveyance of; to give the possession or title of, esp. by a deed or formal writing; to convey."

The following are extracts from statements by the court and relator's counsel during the trial (R. 45-46):

"*The Court*: . . . The grant of the Government was to the School District and not to anyone else."

(R. 46):

"*The Court*: . . . I do not see how any conclusion can be drawn from that, from what the witness has said in answer to the question propounded by Mr. Margiotti, that the money was paid to the electrical contractor by the Government, when as a matter of fact under all the evidence the grant was made to the School Board, who contracted with the contractors and raised that much money from the Government to apply on the contract. That is all I see in it.

Mr. Margiotti: That is correct."

The checks for the PWA grants were payable to the local municipality, were sent to the local municipality, and were deposited by the treasurer or other official of the local municipality in a bank account in the name of the municipality and subject to withdrawal only by the municipality (R. 66-67, 74-76).

7. *Errata.*

Footnote No. 4 in the petition for certiorari (p. 8) appears to us misleading because it says that the I-23 forms "called special attention to the fact that claims against the United States were involved, by citing federal statutes punishing presentation of false claims against the United States (R. 190, 191; 202, 204)." The first statutory provision quoted on the I-23 form is § 9 of the Emergency Relief Appropriation Act of 1935 (c. 48, 49 Stat. 115, 118, R. 191, 204). This section clearly makes a crime of many acts not requiring claims against the United States. The other statutory provision quoted

is § 35 of the Criminal Code of 1909 (c. 321, 35 Stat. 1095, as amended by the Act of October 23, 1918, c. 194, 40 Stat. 1015 and by the Act of 1934, c. 587, 48 Stat. 996, R. 191, 204). The 1934 amendment to § 35 of the Criminal Code extended it to any misrepresentation "in any matter within the jurisdiction of any department or agency of the United States", thereby making a claim against the United States unnecessary. Neither § 9 of the Emergency Relief Appropriation Act of 1935 nor § 35 of the Criminal Code, nor any amendments of the latter, is incorporated into R. S. § 3490, the informer's statute upon which the case at bar is predicated: *Olson v. Mellon, supra; U. S. v. Mercur Corp., supra; U. S. v. McMurtry, supra.*

There are also factual inaccuracies in the excerpt quoted in the petition for certiorari (p. 10) from the opinion of the District Judge. In the first place, the estimates on form I-23 were *not* submitted by the contractor to the Administrator. They were submitted by the contractor to the architect, engineer or other representative of the local municipality, and the latter, after he had approved the estimates, submitted them to the PWA inspector, who after making his notations thereon returned the estimates to the local municipality (R. 118-120). In the second place, payments could be and were made from the construction account without the approval of the Administrator, either on the I-23 forms or elsewhere (R. 62, 101, 108-109 and see Ex. 245, R. 205, 207, 208). Nor was the bank in which said account was placed approved by the Administrator; the only requirement in this respect was that contained in PWA Form 230, Part II, paragraph 5, which specified that the construction account shall be kept in a bank which is a member of the Federal Deposit Insurance Corporation (Ex. 22, R. 163).

III.

Defendants Are Being Punished Twice.

There are also other reasons, it is respectfully submitted, why the decision of the Circuit Court of Appeals is correct. These other reasons were presented by us in the courts below, but it was not necessary for the Circuit Court to mention them, one reason being sufficient for its decision.

The respondents have already been punished by fines in criminal proceedings for the same acts upon which the case at bar is founded (R. 294-329). Penalties and double damages are sought to be recovered, and are included in the verdict in the present action (R. 338). To subject the respondents to penalties, forfeitures or double damages for the same offenses for which they have already been criminally punished violates the Fifth Amendment to the United States Constitution and is contrary to the law as declared in *U. S. v. Chouteau*, 102 U. S. 603, 611-612; *Coffey v. U. S.*, 116 U. S. 436, 443; *U. S. v. LaFranca*, 282 U. S. 568, 572, 573-574, 575; *U. S. v. Gates*, 25 Fed. Cas. 1263, 1266, 1267; *U. S. v. McKee*, 26 Fed. Cas. 1116, 1117; *U. S. v. One Distillery*, 43 Fed. 846, 853; *U. S. v. Shapleigh*, 54 Fed. 126, 134; *U. S. v. Jun*, 48 F. (2d) 593, 594; and *U. S. v. Glidden Co.*, 78 F. (2d) 639, 642-643 (cer. den. 296 U. S. 652).

The averments of the complaint (R. 5-32) in the case at bar are in most respects literally, and in all respects substantially, the same as the averments of the indictments (R. 301-329). The projects upon which damages are claimed in the instant suit are all included in the first indictment, the one at No. 10,462 Criminal—indeed, they are listed in the same order in both. That the issues in the present case are the same as those at No. 10,462 Criminal was stated by relator's counsel when

he offered the record at No. 10,462 Criminal in evidence during the trial of the instant case (R. 117-118).

The $2,000 penalty which the informer's act, R. S. § 3490 (R. 407), provides that the defendant "shall forfeit and pay", in addition to double damages, is clearly penal in character and constitutes a penal sanction.

In *U. S. ex rel. Ostrager v. New Orleans Chapter, Associated General Contractors; supra,* the District Court based its dismissal of the complaint on this ground, *i. e.,* that the informer's action under R. S. § 3490 was barred because it was an attempt to punish the defendants a second time, they already having been indicted and fined for the same acts, just as in the case at bar. The District Court's opinion in that case is not reported but is referred to in the opinion of the Circuit Court of Appeals for the Fifth Circuit (see 127 F. (2d) p. 650).

IV.

Official Consent Needed.

The necessary authorization or sanction by government officials for the institution and prosecution of this suit has not been obtained or shown. The relator has not shown that he obtained the authorization or sanction of the Commissioner of Internal Revenue, of the Attorney General or of any other government official, and in fact he has not obtained any such approval. We submit that the authorization or sanction of the Commissioner of Internal Revenue and of the Attorney General is a condition precedent to the bringing and maintaining of such a suit as this.

R. S. § 3214 reads as follows:

"No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner of Internal Revenue author-

> izes or sanctions the proceedings: *Provided,* That in case of any suit for penalties or forfeitures brought upon information received from any person, other than a collector or deputy collector, the United States shall not be subject to any costs of suit."

R. S. § 3214 should not be limited, we submit, to suits involving taxes. The section was expressly extended by Congress to cover as well any suit for the recovery "of any fine, penalty or forfeiture." A forfeiture is sought to be recovered in the instant suit and accounts for $112,000 of the verdict. The $2,000 item is specifically described as a "forfeiture" by Congress in the informer's act upon which this suit is brought (R. S. §§ 3490, 3492 and 3493).[8] R. S. § 3214, therefore, by its express terms applies to the case at bar.

Following Executive Order No. 6166, issued by the President, the Act of February 10, 1939, c. 2, 53 Stat. 1, 460 (26 USCA § 3740) provides as follows:

> "No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced."

The approval of the Attorney General is now, therefore, also required for such a suit as this. Since his approval has not been shown, the suit cannot be maintained.

There are sound reasons of public policy why the approval of the Commissioner of Internal Revenue and of the Attorney General should be required to the bringing of such a suit as this, but it is not necessary to delve into them.

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8. These sections appear in the record (R. 407-408).

V.

Conclusion.

The opinion of the Circuit Court of Appeals in this case is so completely in accord with every other case in point, including the recent decision by the Circuit Court of Appeals for the Fifth Circuit in *U. S. ex rel. Ostrager v. New Orleans Chapter, Associated General Contractors, supra*, the decision is so clearly right for the reasons presented in this brief, and the absence of any special and important reason for reviewing the decision is so apparent, that it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

NO. 173.

UNITED STATES OF AMERICA ex rel. MORRIS L. MARCUS and MORRIS L. MARCUS in his own behalf, Petitioners,

v.

WILLIAM F. HESS et al., Respondents.

BRIEF FOR RESPONDENTS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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Criminal Code, § 35 .....14, 23, 24, 29, 61, 63, 64, 116

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Act of October 23, 1918, c. 194; 40 Stat. 1015 24

Act of Oct. 28, 1919, c. 85, Tit. II, § 35; 41 Stat. 317 .....88, 89

Act of Nov. 23, 1921, c. 134, § 5; 42 Stat. 223 88

Act of Feb. 26, 1926, c. 27, § 900; 44 Stat. 104 .....88, 89

Act of May 29, 1928, c. 852, §§ 146 (b), 293 (b); 45 Stat. 858 92-93

Reorganization Act of March 3, 1933, c. 212, § 16; 47 Stat. 1517 99

Act of June 18, 1934, c. 587; 48 Stat. 996 24

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Act of April 4, 1938, c. 69; 52 Stat. 197 24

Act of February 10, 1939, c. 2; 53 Stat. 460 100

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31 USCA § 231 .....21, 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

NO. 173.

UNITED STATES OF AMERICA ex rel. MORRIS L. MARCUS and MORRIS L. MARCUS in his own behalf, Petitioners,

v.

WILLIAM F. HESS et al., Respondents.

BRIEF FOR RESPONDENTS.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of the District Court is reported in 41 F. Supp. 197. The opinion of the Circuit Court of Appeals is reported in 127 F. (2d) 233.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938.

COUNTER-STATEMENT OF THE CASE.

This is a *qui tam* action brought under R. S. §§ 3490-3494[1] by a so-called informer, who simply copied the Government's indictment to which the respondents had already pleaded *nolo contendere* and on which the respondents have been fined and have paid their fines (R. 294-329).

Between 1935 and 1939, inclusive, various cities, boroughs, school districts and other local municipalities in Allegheny County, Pennsylvania, being in need of new public buildings or works, such as schools and recreational facilities, caused plans and estimates of the cost of such improvements to be made by architects or engineers hired by them and then applied to the Federal Emergency Administration of Public Works (hereinafter referred to as "PWA") for a grant, or loan and grant, to help finance construction of the project (R. 82). In the instances here involved, PWA responded with an offer of 30% or 45% of the actual cost, not exceeding, however, a specified sum. The latter figure was either 30% or 45%, as the case might be, of the estimated total cost (R. 48, 109-110, Tr.[2] 60-61, 196, 203). There was a maximum limit in dollars and cents contained in every PWA offer (Tr. 64). It was stipulated that for each of the projects involved there was an offer of a grant from the PWA and an acceptance by the local municipality (R. 116-117). Each offer from the PWA was addressed to a local municipality and the grant was expressly to the local municipality. The gist of the offers from the PWA was in the following form:

> "Subject to the Terms and Conditions (PWA Form No. 230, as amended to the date of this Offer),

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1. These sections are printed in the Record (R. 407-408).

2. In this brief "R." refers to the printed Record. "Tr." refers to the certified record on appeal.

which are made a part hereof, the United States of America hereby offers to aid in financing the construction of a school building, including necessary equipment, the acquisition of necessary land, and the improvement of the grounds (all herein called the "Project"), by making a grant to School District of the City of Pittsburgh, Allegheny County, Pennsylvania (herein called the "Applicant"), in the amount of 45 percent of the cost of the Project upon completion, as determined by the Federal Emergency Administrator of Public Works (herein called the "Administrator"), but not to exceed, in any event, the sum of $139,108."

A sample of one of said offers from the PWA is printed in the Record (Ex. 76, R. 179-180). The sample offer printed is an amendatory one; the original offers were identical, except that they did not contain the paragraph numbered 4. All of the provisions of PWA Form 230 which could possibly be considered relevant to the issues in this case are also in the printed Record (Ex. 22, R. 157-179). The PWA offer was accepted by resolution of the local municipality, and said offer and acceptance constituted the contract between the Federal Government and the local municipality (Tr. 7-8, 30, 33, 52-53, 123-125).

After the contract between the PWA and the local municipality had been made, the local municipality advertised for bids on the work (R. 43-44, Tr. 204, 262). Although these advertisements disclosed that a PWA project was involved, the advertisements were distinctly by the local municipality and solicited bids solely to the local municipality. A copy of the advertisement was included in the contract between the local municipality and the contractor. A sample advertisement is contained in the copy of the contract which is printed in the Record (Ex. 566, R. 217-218).

The respondent electrical contractors, on fifty-six of the projects listed in the complaint according to the jury, bid collusively. The respondents divided themselves into four brackets, each bracket to handle jobs within a certain price range. Each contractor chose his own bracket and could change from one to another (Tr. 1805, 1809). At first the members of the bracket into which the job in question fell would meet together with Carmack, the Manager of the Electrical Contractors Association, average the amount which each one had estimated the job would cost, and the one whose estimate was nearest the average would be made the successful bidder by all of the others who had been lower than him raising their bids above his (Tr. 897, 1875). Subsequently this plan was modified to the extent that, instead of meeting together, each interested contractor reported his estimated cost of the job to Carmack, who averaged those estimates and then told each contractor how much he should bid, Carmack so regulating the amounts that the contractor who had the least volume of prior work would be the successful bidder at the average price determined as above (Tr. 900-901, 1809, 1875). The contractors were forced to comply by the denial through the labor union of labor to perform their contracts and by sabotage on their work (Tr. 1542-1543). The "volume penalty" referred to by petitioner was very seldom used; petitioner's witness testified "there wasn't more than four or five" (Tr. 1964). The above bidding plans did not apply to the many cases in which an owner who wanted electrical work done would call one particular contractor and award the contract to him without soliciting bids (Tr. 2226-2227).

The bids or proposals of the respondents were addressed solely to the local municipality (R. 225). In most cases, but not always, the bid was accompanied by a certificate or affidavit that there had been no collusion in the bidding. No certificate or affidavit of non-collusion

was required by the contract between the PWA and the local municipality (Ex. 22 and 76, R. 157-184). When required by the local municipality they were, in many instances at least, kept by the local municipality and not submitted to the PWA (R. 49, 51-52, Tr. 47, 57). The petitioner is in error in stating in his brief (p. 13) that "the government later demanded that affidavits—rather than mere certificates of non-collusion—be furnished by the contractors (Tr. 427)." No Government contract or regulation requiring an affidavit, or any other kind of statement of non-collusion, is in evidence or exists to our knowledge. The testimony referred to is simply that certain employees of the City of Pittsburgh were "advised" to obtain affidavits "after the first trial came up", meaning the grand jury hearing in November, 1939 (R. 51). The latest City of Pittsburgh contract involved in this case was made on August 7, 1939 (Ex. 580), and neither it, nor any other contract in this case, requires a non-collusion affidavit, but it merely reserves to the City the option to call for such an affidavit, as follows: "The City reserves the right before any award of the contract is made, to require of any bidder to whom it may make an award of the principal contract a non-collusion affidavit" (Ex. 580, p. 7). The fact is as testified by petitioner's only witness who was examined on the question: "It was left entirely in our [the municipality's] hands whether we would employ them or not" (R. 49). When non-collusion affidavits were taken they were retained by the local municipality in its own files and not submitted to the PWA (R. 52). A form of bid or proposal is contained in the contract printed in the Record (Ex. 566, R. 225-226).

The contracts for performance of the work were awarded by resolution of the local municipality (R. 80, 106). A sample of one such resolution is printed in the Record (Ex. 169, R. 196-198).

The maximum limitation upon the amount of the PWA grant to the local municipality was not increased because of the amount of the contracts subsequently entered into by the municipality for the actual construction of the improvement (R. 83, 87-89, 92-93, 101-102). Thus, in the case of the Snowden Township School, the School District received only $23,727 from the PWA (R. 102), which was 45% of the originally estimated cost of the school of $52,727 (Tr. 294). The actual cost of the school, however, was $62,633.15 (Tr. 297), 45% of which actual cost is $28,184.92.

The contracts for doing the electrical and other work are solely between the local municipality and the contractor who is to do the work (R. 42-43). They are strictly two-party contracts. Neither the United States Government nor any officer, department, agency or instrumentality of it is any party to any of those contracts. In order that there may be no doubt about this, the contracts for all of the projects which were left in the suit at the conclusion of the evidence are included in the record on appeal. The relevant parts of one of the City of Pittsburgh contracts is printed in the Record (Ex. 566, R. 217-292). The heart of this agreement is parallel to the "agreement" portion of all of the other contracts and reads as follows (R. 274-276):

"THIS AGREEMENT

MADE the Oct 8 1938 day of ....., in the year 1938, by and between **John W. Craig**, d/b/a John W. Craig Electric Company, of 726 Herschel St., Pittsburgh, Pa. hereinafter called the 'Contractor,'

and

City of Pittsburgh, a municipal corporation of the State of Pennsylvania, acting in this behalf through Cornelius D. Scully Mayor, and Frank M. Roessing Director of the Department of Public Works of said

City, they having been duly authorized thereto by Ordinance of the Council of said City, hereinafter called the 'City';

WITNESSETH:

ARTICLE 1. SCOPE OF WORK.

The Contractor shall furnish all of the materials and perform all of the work shown on the drawings and described in the specifications, entitled —Construction of a Bath House and Swimming Pool at Burgwin Playground. Contract No. 4—Electrical—and shall do everything required by this Agreement and the contract documents.

ARTICLE 2. TIME OF COMPLETION.

The work to be performed under this contract shall be commenced when ordered by the Director, and shall be fully completed within One Hundred Twenty (120) consecutive calendar days from and including the date the General Contract is countersigned by the City Controller.

ARTICLE 3. THE CONTRACT SUM.

The City shall pay the contractor for the performance of the contract, subject to additions and deductions provided therein, in current funds as follows: Four Thousand Eight hundred seventy dollars ($4,870.00).

. . . . . ."

The contract (Ex. 566) is signed solely by the electrical contractor, John W. Craig, and various officials of and for the City of Pittsburgh (R. 276). Each of the contracts for all of the other projects in question is similarly executed only by an electrical contractor and a local municipality.

After the contracts for the doing of the work were entered into, they were submitted to the regional direc-

tor of the PWA and came back with a qualified approval stamped thereon in substance as follows (R. 51, 217, Tr. 10, 142, 341):

"Approved as to conformity with Agreement between the Applicant and the United States of America."

The contractor was notified by the local municipality when to start work. A letter from the Hampton Township School District to the Carter Electric Company to that effect is printed in the Record as an illustration (Ex. 301, R. 216).

The immediate and final direction and control of the work as it progressed was exercised by the local municipality, though the PWA had a "resident engineer inspector" who inspected the job from time to time (R. 52, 68-69, 72-74, 77-79, 80-81, 86-87, 91-92, 93-95, 97-98, 101-103, 108, 110-111, 113). The local municipality was represented by its architect or engineer, or an employee of the architect or engineer, who was on the job most, if not all, of the time, and a "clerk of the works" (who was generally a former contractor), who was always on the job. Sometimes also the local municipality would appoint a committee of its officials, who kept in close touch with the work, and took a leading part in the matter of changes in the plans (R. 83-84). The PWA's representative inspected the work an hour or so a day; he had several projects under his inspection at the same time. The final acceptance of the work after its completion was by the local municipality (R. 115, 116).

Each payment to every contractor was made by the local municipality which had contracted with him, by check or draft signed solely by officials of the local municipality, drawn on bank accounts which were subject to check only by officials of the local municipality and not by the PWA or any officer of it (R. 44, 45-46, 57-58, 60-68, 70, 74, 76, 81, 85, 89-90, 95-98, 100-101, 103-104, 106-108, 114). Each bank account was in the name

of the local municipality, with some such designation as "construction account" to differentiate it from other accounts of the local municipality. The bank accounts were occasionally audited by the PWA (R. 107). A sample of one of the checks used in paying a contractor is printed in the Record (Ex. 213, R. 201). These payments were made by the local municipality upon presentment to its secretary, treasurer or other proper authority of monthly estimates of the work done and materials furnished during the preceding month (R. 48-49, 66, 68, 70, 76, 79, 85, 90, 92, 95, 97, 100, 104 [stipulation], 105-106, 108, 112, 118-120). Sometimes the governing body of the local municipality passed a separate motion or resolution directing the payment by the disbursing officer of the municipality of each monthly estimate as it was presented (R. 76, 79-80, 85, 96, 99, 108, 112, 114, 115-116). These monthly estimates were usually on PWA Form I-23, one of which (part of Ex. 245) is printed in the Record as a sample (R. 202-207). Contrary to the statement in petitioner's brief (p. 16) that "the approval of the federal officers was the last step necessary" for the release of funds from the construction account to the respondents, the last step was the resolution or other action of the governing body of the local municipality directing its disbursing officer to write the municipality's check and deliver it to the contractor, which is demonstrated by the fact that on various of the involved projects the local municipality is withholding part of the contract price from the contractor notwithstanding that the municipality has received the full amount of the agreed grant from the PWA (Tr. 667, 671).

The City of Pittsburgh, in addition to the monthly estimate on the I-23 form, also caused a "Current Estimate" signed only by various city engineers and officials and a "Departmental Invoice" also signed only by certain city officials to be presented by the city Department

of Public Works to the City Controller, who actually drew the checks and paid the contractors (R. 57-59, and see Ex. 107, R. 185-194).

The receipts for the payments, where receipts were taken, acknowledge receipt of payment exclusively from the local municipality (Ex. 264, R. 209). When the final payment was made the contractor gave a release, which ran solely to the local municipality, and a certificate that all persons who had supplied labor or material for him on the job had been paid in full by him, which certificate also was addressed solely to the local municipality (Ex. 190, R. 198-200).

The funds in the aforesaid construction account were obtained by the local municipality by the sale of its bonds, from its general funds, in one case by collection of fire insurance on a burned building of the municipality and by the grants from the PWA (R. 72). The checks for the PWA grants were payable to the local municipality, were sent to the local municipality, and were deposited by the treasurer or other official of the local municipality in the aforesaid account in the name of the municipality and subject to check only by the municipality (R. 46, 66, 67 [stipulation], 74-76). As provided in sections 1, 3 and 4 of Part II of PWA Form 230 (Ex. 22, R. 160-163), the PWA grant was paid to the municipality in four installments. Sometimes the local municipality paid the contractor before it had any money on hand from the PWA, and all of the contractors had to be paid in full by the local municipality before the final 10% of the PWA grant would be paid to the municipality (R. 53, 55, 112-113).

The periodical estimates for partial and final payment on the I-23 forms were generally handled as follows (R. 118-120). Near the end of each month the contractor, a representative of the local municipality and the PWA inspector would go over the job together

and agree how much work had been done during that month, or, in other words, what should be put on the periodical estimate (the I-23 form) for that month. The contractor would then prepare the monthly estimate in accordance with what had been agreed upon and present it to the architect, engineer or other representative of the local municipality. After the representative of the local municipality had noted his approval on the estimate, he would hand it to the PWA inspector. The PWA inspector would then sign the form under the certificate intended for him, but would sometimes except certain items from his certification, as is true on the I-23 form printed in the Record (Ex. 245, R. 207). The periodical estimate was finally delivered to and retained by the local municipality, which then proceeded to pay the contractor as already described.

The local municipality could, if it wished, pay the contractor the full amount of the estimate notwithstanding some qualification or exception to the certification of the PWA inspector thereon (R. 62), and having authorized the work to be done was bound to pay for it whether the PWA approved it or not (R. 108-109). In fact the local municipalities repeatedly actually did pay the contractor the full amount of a periodical estimate, notwithstanding that the PWA inspector had excepted one or more items thereon from his certification (R. 101, 108-109, Tr. 64-65). An instance of this kind is shown by the periodical estimate (I-23 form) which is printed in the Record (R. 202-207) and the warrant or draft of the West View School District in payment of that periodical estimate (R. 208, both parts of Ex. 245). Under the heading "Remarks" at the end of this periodical estimate, it will be seen that the PWA inspector expressly excepted one item from his certification because it entailed a change which had not been approved by the PWA (R. 207). Nevertheless, the School Board's draft

was for $1,562.39, the same amount as the total shown due by said periodical estimate (R. 205, 208).

The periodical estimates on the projects of Allegheny County were handled a little differently. It appears that the County's resident engineer on each project estimated the amount of work done each month, made up the periodical estimate, had it signed by the contractor and the PWA inspector and then caused it to be presented by the County Department of Public Works to the County Controller, who then paid the contractor (R. 40-41, 44, 52-53).

The excerpt from the opinion of the trial judge which is quoted in petitioner's brief (p. 14) contains, we respectfully submit, the following errors: (1) The estimates on the I-23 forms were not submitted by the contractor to the Administrator. They were submitted by the contractor to the architect, engineer or other representative of the local municipality, and the latter, after he had approved the estimates, submitted them to the PWA inspector, who, after making his notations thereon, returned the estimates to the local municipality (R. 118-120). (2) The periodical estimates on the I-23 forms were never approved by the Administrator, meaning the Federal Relief Administrator of Public Works, but only by a PWA "resident engineer inspector." (3) Payments could be and were made from the construction account without the approval of the Administrator, either on the I-23 forms or elsewhere (R. 62, 101, 108-109, Ex. 245, R. 205, 207, 208). (4) The estimates on the I-23 forms were never sworn to. (5) The bank in which the construction account was placed was never approved by the Administrator; the only requirement in this respect was that contained in PWA Form 230, Part II, p. 5, which specified that the construction account should be kept in a bank which was a member of the Federal Deposit Insurance Corporation (Ex. 22, R. 163).

If changes or additions were desired to the plans after the contract for the grant had been made, such changes or additions were decided upon by resolution of the governing body of the local municipality (R. 84 and see the resolution portion of Ex. 151 included in the certified record). All changes and additions were reported to the regional director of the PWA, who replied on PWA Form 84, approving or disapproving the change. A sample of this Form 84 is included in the certified record on appeal (the first sheet of Ex. 151). Form 84 contains the following paragraph:

> "The Public Works Administration, in approving any change, assumes no obligation to finance the cost thereof, except to the extent to which the same may be paid out of funds expressly contracted for by it, and specifically makes no representation concerning any additional funds necessitated by any approved change."

In fact, so far as the record shows, the PWA did not contribute toward the cost of any changes or additions (R. 70, 80). The order to the contractor for any changes or additions came exclusively from the local municipality (see the copy of one such change order from the Pittsburgh Board of Education to the Morganstern Electric Co., being the first part of Ex. 297, included in the certified record).

At the conclusion of a project the PWA sent its Form 290 to the local municipality, being a recapitulation of the agreed amount of the grant, the sum which had actually been paid by the PWA to the municipality, and an explanation of any discrepancy. One such form is printed in the Record (Ex. 265, R. 211-215). This particular Form 290 shows that part of the agreed grant had been suspended from payment by the PWA "pending action by the Owner regarding collusive bidding on this contract", referring to the electrical contract (R.

215). The "owner" refers to the local municipality. Similar statements appeared on other communications from the PWA explaining suspensions on grant payments (R. 47-51, and see Ex. 150, R. 195).

At the trial there were offered in evidence the records of the District Court at No. 10462 Criminal to No. 10498 Criminal, both inclusive, for the purpose of showing that the respondents had already been criminally punished for the same acts upon which the instant suit is predicated (R. 126-127). At No. 10462 Criminal all of the respondents in the instant action had been indicted under § 37 of the Criminal Code (18 USCA § 88) for conspiring to defraud the United States. A copy of this indictment is printed in the Record (R. 301-322). At No. 10463 to No. 10498, inclusive, each of the respondents, except respondents Ridinger, Sr., and Jr., Bickford, Iron City Engineering Co., Walter and Murray, was separately indicted under § 35 of the Criminal Code as amended in 1934 (18 USCA, 1940 Pocket Part, § 80) for making false certificates or affidavits of non-collusion in bidding on the same projects which are embraced in the prosecution at No. 10462 Criminal and in the instant action. A copy of the indictment at No. 10463 Criminal is also printed in the Record (R. 323-329). The indictments at the subsequent numbers were the same as that at No. 10463 Criminal except as to the names of the defendants and of the jobs. The respondents Ridinger, Sr., and Jr., Bickford and Iron City Engineering Co. were not indicted for making any false certificates or affidavits of non-collusion because in fact neither they nor anyone in or for their company ever made any. The respondents all pleaded *nolo contendere* to the indictment at No. 10462 Criminal, were sentenced by the court to pay fines and have paid the fines imposed upon them, respectively. The other indictments were *nol. prossed*. The relevant docket entries to show the dis-

position of those criminal proceedings are printed in the Record (R. 294-300, 322).

M. Neil Andrews, Esq., took the witness stand for the respondents and an offer was made to prove by him that he was a Special Assistant to the Attorney General of the United States; that as such he was in charge for the Government of the criminal prosecutions against the respondents for the conspiracy in bidding for the electrical work on the same PWA projects that are involved in this suit, and the making of false certificates and affidavits of non-collusion in connection with those projects, which offenses were the subject of the indictments at No. 10462 Criminal to No. 10498 Criminal in the District Court; that as the representative of the Government he agreed with the respondents in this case as to the disposition of those criminal proceedings, and that said agreement was that if the respondents would plead *nolo contendere* to the indictment at No. 10462 Criminal the Government would be satisfied with whatever punishment the court imposed in that case as being also in complete satisfaction of all criminal liability of the respondents on all of the indictments, both for the conspiracy and the false certificates and affidavits of non-collusion which were the subject matter of the indictments at No. 10463 to No. 10498 Criminal, both inclusive, and that as a matter of convenience, the entire punishment or fines would be imposed at No. 10462, and the indictments at No. 10463 to No. 10498, both inclusive, would be *nol. prossed* (R. 125-126). This offer was excluded (R. 126).

The respondents also offered to prove the actual cost of doing each one of the projects by competent witnesses who were familiar with what those jobs actually cost, and to follow that evidence with other evidence to prove that the actual cost of doing the jobs was fair and reasonable and the lowest price at which the respec-

tive jobs could be done (R. 120-123). All of these offers were rejected.

The respondents also offered to prove by qualified witnesses that their reputations for honesty, fair dealing, integrity and law abidance were very good (R. 123-124). This evidence was also excluded.

In his closing address to the jury, counsel for the relator in effect argued that because the respondents had pleaded *nolo contendere* in the prior criminal proceedings, the jury should find that they were also liable in the case at bar (R. 127-129). The respondents objected and asked for the withdrawal of a juror (R. 127-129). Relator's counsel attempted to justify his argument by reason of the fact that defense counsel in their opening to the jury had told them that the respondents expected to show that they had already been indicted, pleaded *nolo contendere* and been fined for the same offenses which were the basis of the present suit and, therefore, could not be subjected to further penalties or double damages for the same acts and in closing had explained to the jury that that evidence had not been introduced because it had been held incompetent, but asked the jury not to draw any inference that the respondents were liable in this case, because they had pleaded *nolo contendere* to indictments under different statutory provisions (R. 128). The motion to withdraw a juror was declined (R. 129). Counsel for the relator then resumed his argument to the jury that they should find the respondents, and particularly Ridinger, Sr., Bickford and Yates (as to whom it had been argued to the jury by their counsel that they had not been participants in the illegal bidding) liable in this case because they all had pleaded *nolo contendere* in the criminal case (R. 127-129). Again a motion to withdraw a juror and continue the case was made and refused (R. 129).

All of the respondents presented a joint and several written request for a directed verdict in their favor, setting forth the specific grounds therefor (R. 333-334). Each respondent also presented a separate written request for a directed verdict in his favor, incorporating the same grounds (R. 334). All of these requests were refused (R. 147, 334).

The jury returned a verdict against all of the defendants, except Carmack, the Manager of the Electrical Contractors Association, in the sum of $315,100.91, consisting of $203,100.91 damages (being double the actual damages found by the jury) and $112,000 penalties (R. 338).

In due time the respondents filed a joint and several motion that judgment be entered in their favor, in accordance with the motions which they presented at the trial for directed verdicts in their favor (R. 339). At the same time each respondent also filed a separate motion for judgment in his favor (R. 340). Also at the same time the respondents filed a motion in the alternative for a new trial, setting forth the specific reasons therefor (R. 341-346). The trial judge denied all of these motions (R. 387-389).

The respondents duly appealed to the Circuit Court of Appeals for the Third Circuit (R. 390-391). While the case was pending in the Circuit Court of Appeals the Government, through the Honorable Assistant Attorney General, Thurman Arnold, petitioned that Court for leave to file a brief as *amicus curiae* and to participate in the oral argument before that Court, which leave was granted (R. 467). In the Government's said petition and accompanying brief it asked that the judgment of the District Court "be reversed" and "that the action be dismissed" ("Petition on Behalf of United States for Leave to File Brief as Amicus Curiae" pp. 1-2, and "Brief on Behalf of the United States as Amicus Curiae" p. 15).

After full argument and consideration, the Circuit Court of Appeals reversed the judgment of the District Court and remanded the case to the latter for further proceeding in accordance with the Circuit Court's opinion (R. 485), which was simultaneously filed (R. 471), and certain clerical errors therein promptly corrected (R. 487). Upon petition of the relator, a certiorari was granted by this Court.

SUMMARY OF ARGUMENT.

I. (a) R. S. § 3490, upon which this action is based and which is to be construed strictly, imposes liability only for presenting a false "claim upon or against the Government of the United States, or any department or officer thereof." The respondents' contracts were exclusively with the local municipalities. Neither the United States Government nor any department or officer thereof ever promised to pay the respondents a cent for their work. The respondents, therefore, never had any "claim upon or against the Government of the United States, or any department or officer thereof", and consequently could not make or present any such claim for payment or approval.

(b) The statutory provisions upon which this action is based require a "false, fictitious or fraudulent claim", as a claim for payment for materials which, in fact, were never furnished. The respondents fully performed their contracts and their claims against the local municipalities for payment were, therefore, not false, fictitious or fraudulent.

II. The respondents have already been punished by fines in criminal proceedings for the same acts upon which the case at bar is founded. Penalties and double damages are sought to be recovered in the present action. To subject the respondents to penalties, forfeitures or double damages for the same offenses for which they have already been criminally punished is unlawful.

III. The sanction of the Commissioner of Internal Revenue and of the Attorney General is a condition precedent to the bringing and maintaining of such a suit as this. This suit was brought without the sanction of either.

IV. In view of the specific limitation in dollars and cents upon the amount which the PWA would grant to

the municipality on each project, it is impossible to tell from the evidence in this case how much, if anything, the Federal Government paid out because of the acts of the respondents which it would not have paid out in the absence of such acts. The burden is on the plaintiff to prove the damages. That burden was not fulfilled in this case.

V. If all of the above reasons were rejected, it is submitted that the respondents are entitled to a new trial for any one of the following three reasons:

(a) Respondents offered to prove the actual cost of doing the electrical work on the projects in question and that such costs were fair and reasonable and the lowest prices at which the work could be done in accordance with the respective contracts. All such evidence was excluded.

(b) Respondents also offered to prove by competent witnesses that their reputations for honesty, fair dealing and integrity and for being law-abiding citizens were very good. All such evidence was excluded. This action being in part to recover a penal sanction, character evidence should be admissible.

(c) Relator's counsel in his closing address to the jury argued that respondents' plea of nolo contendere in the criminal proceeding constituted an admission of their liability in the case at bar. The plea of nolo contendere may not be used as an implied admission of liability in a subsequent action. Respondents' motion to declare a mistrial was overruled.

VI. If all of the above reasons were rejected, it is submitted that the verdict, which included $112,000 by way of penalties, was excessive to the extent of $110,000, because only one penalty or forfeiture of $2,000 can be included in the recovery in any single case brought under R. S. § 3490.

ARGUMENT.

At the outset we wish it clearly understood that we are not condoning or seeking to palliate the collusive bidding in which any of the respondents engaged; and this regardless of considerable that might be said for them to show to what extent the bidding system was an outgrowth of NRA (which was outlawed on May 27, 1935), how the respondents were forced to comply, or that only a price reasonable to all interested parties was sought. We have always admitted that the proper respondents should make restitution for any actual damages inflicted, through voluntary negotiations with the local municipalities or suits brought by the local municipalities. Nor will we stand in the way of the Federal Government enforcing any legal right which it ever had to recover compensatory damages for any injury it has actually suffered. But what we do oppose is being mulcted for double damages and $112,000 in penalties in a suit unauthorized by law, brought by a private relator who informed the Government of nothing and who, other than referring incorrectly to the statutes under which he brought this action, simply copied the Government's public indictments to which the respondents had already pleaded *nolo contendere*.

Statutes Involved.

This action, as expressly averred in paragraph 1 of the complaint (R. 5), is specifically based upon §§ 3490-3494 of the Revised Statutes of the United States, adopted in 1874. Besides the official edition of the Revised Statutes, these sections may also be found in 2 Fed. Stat. Ann. pp. 208-210, and in 6 U. S. Comp. Stat. §§ 6411-6415. We do not refer to 31 USCA § 231 for R. S. § 3490, because as held in *Olson v. Mellon*, 4 F. Supp. 947, affirmed *sub nomine U. S. ex rel. Knight v. Mellon*, 71 F. (2d) 1021 (certiorari denied 293 U. S. 615),

R. S. § 3490 is not correctly copied in 31 USCA § 231 and the United States Code Annotated is a private publication which, as stated in its preface, does not have the force of law and was not intended to amend, enact or repeal any law. R. S. §§ 3490-3494 as copied from the official edition of the Revised Statutes are printed in the Record (R. 407-408). There have been no amendments to R. S. §§ 3490-3494 since the Revised Statutes were adopted in 1874.

R. S. § 3490 reads as follows:

> "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

R. S. §§ 3491-3494 relate only to procedural subjects and give half of any recovery to relator (R. 407-408).

R. S. § 5438, which is incorporated into R. S. § 3490, began, at the time of the enactment of the Revised Statutes in 1874, as follows:

> "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining

or aiding to obtain the payment or approval of such claim, makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

The portion of R. S. § 5438 omitted from the foregoing quotation relates to the misappropriation of military property of the United States. R. S. § 5438 is quoted in full in the Record (R. 409-410) as it read when the Revised Statutes were enacted.

Any further legislative history is material only to perceive the inapplicability of cases relied upon by the relator and the trial judge and certain arguments of the relator. All of the statutory provisions referred to above were derived from the Act of 1863, c. 67, 12 Stat. 696. That Act of 1863, however, was wholly repealed by R. S. § 5596. The Revised Statutes are more than a compilation—they are the law, except as parts thereof have been subsequently amended or repealed: *Dwight v. Merritt*, 140 U. S. 213, 217.

R. S. § 5438 was amended by the Act of May 30, 1908, c. 235, 35 Stat. 555, merely to reduce part of the criminal punishment, which is not material to this case. R. S. § 5438 was specifically and wholly repealed by § 341 of the Act of March 4, 1909, c. 321, known as the Criminal Code of 1909, 35 Stat. 1095, 1153, 1159. Section 35 of said Criminal Code of 1909 contained with slight variations the same language which had been in R. S.

§ 5438. Section 35 of the Criminal Code of 1909 was amended by the Act of October 23, 1918, c. 194, 40 Stat. 1015, to include any corporation in which the United States is a stockholder and the falsifying or concealing of a material fact by any trick, scheme or device and the making of any false statement or representation for the purpose of cheating, swindling or defrauding the Government, or any department thereof, or any corporation in which it is a stockholder. The additions made to § 35 of the Criminal Code in 1918 are fully and clearly shown in the reprint of the Act of 1918 in the Record (R. 414-416). It is the parts of § 35 of the Criminal Code as amended in 1918 which constitute 18 USCA §§ 80 and 83, which are quoted in paragraph 6 of the relator's complaint, *but those are not the statutory provisions which are incorporated into R. S. § 3490.* By the Act of June 18, 1934, c. 587, 48 Stat. 996, § 35 of the Criminal Code was further amended by extending it to any misrepresentation in "any matter within the jurisdiction of any department or agency of the United States". The precise amendment is set forth in the Record (R. 416-418). *This 1934 amendment also is not incorporated into R. S. § 3490 and cannot be invoked to support the case at bar.* There was also a slight amendment made to § 35 of the Criminal Code by the Act of April 4, 1938, c. 69, 52 Stat. 197.

It is definitely settled that the so-called informer's act, R. S. § 3490, incorporates only R. S. § 5438 as the latter was enacted in 1874, and *not any of the amendments to § 5438 or to § 35 of the Criminal Code of 1909: Olson v. Mellon, supra.* It is also definitely settled that the informer's act, R. S. § 3490, does not incorporate 18 USCA § 80 and/or § 83, quoted in the complaint: *Olson v. Mellon, supra.* In accord are *U. S. v. Mercur Corp.*, 13 F. Supp. 742, 743, affirmed in 83 F. (2d) 178 (certiorari denied 299 U. S. 576) and *U. S. v. McMurtry*, 5 F. Supp. 515, 517.

I.

No Statutory Authorization for This Suit.

1. *Informers are not favored.*

In addition to the cases cited by the court below for the rule that *qui tam* actions are regarded with disfavor, Mr. Justice Brewer, when a Circuit Judge, said of an informer who brought a *qui tam* action in *Taft v. Stephens Lith. & Eng. Co.*, 38 Fed. 28, 29:

> "Plaintiff is not suing for the value of his services, or for injury to his property, but simply to make profit to himself out of the wrongs of others; and when a man comes in as an informer, and in that attitude alone asks to have a half million dollars put into his pocket, the courts will never strain a point to make his labors light, or his recovery easy."

2. *R. S. § 3490 is to be construed strictly.*

R. S. § 3490 is penal in nature and must, therefore, be strictly construed. To that effect in *Olson v. Mellon, supra*, Judge Gibson, whose opinion was adopted by the Circuit Court of Appeals and a certiorari refused by this Court, said (p. 949):

> "Counsel for the plaintiffs have contended that sections 3490, 3491, Rev. St., are remedial statutes, and, as such, are entitled to a quite liberal construction, as opposed to the strict construction to be given a penal statute. With this contention we are unable to agree. *The statute is plainly penal in its nature, and is not to be enlarged by implication;* and, unless it be so enlarged, no statutory authority exists for plaintiffs' suits." (Italics added)

In *U. S. ex rel. v. Kansas Pacific Ry. Co.*, 26 Fed. Cas. No. 15,506, the court said of R. S. § 3490 (p. 680):

"The law under which this suit is brought being a penal statute, it should not be enlarged by implication, but should be strictly construed."

Ferrett v. Atwill, 8 Fed. Cas. No. 4,747 (C. C., N. Y., 1846, Nelson, C. Justice, and Betts, D. J.), was an informers' suit brought by two men jointly for themselves and the United States to recover the statutory penalty for falsely impressing upon a musical composition that it had been copyrighted under an Act of Congress. The defendant's demurrer was sustained because two men, rather than only one, acted as relators. While this case is under a different informer's statute than the one under which the present suit is brought, it shows how strictly informer's statutes are construed. The court said (p. 1163):

"Courts will not give an equitable construction to a penal law, even for the purpose of embracing cases clearly within the mischief intended to be remedied. U. S. v. Sheldon, 2 Wheat. (15 U. S.) 119; Myers v. Foster, 6 Cow. 567; Daggett v. State, 4 Conn. 61. They sedulously limit the action of penal statutes to the precise cases described in them, and reject an interpretation tending to comprehend matters not named by the legislature, although analogous. The authorities cited are explicit to this point, and are in unison with numerous others, English and American. Cone v. Bowles, 1 Salk. 205; Reniger v. Fogossa, 1 Plowd. 17; Fleming v. Bailey, 5 East. 313.

"The privilege of claiming or enforcing a penalty is one of statutory appointment, and must be construed with like strictness."

Then after reviewing some cases which supported its decision, the court continued as follows (p. 1163):

"The plain language and sense of the statute under consideration, restrict the right of action to

a single person; and we should not be disposed, on general principles, to enlarge its operation, so as to encourage associations of individuals in instituting and conducting penal actions, the nature of those actions in our opinion exacting a rigorous adherence to the terms of the law."

The Circuit Court of Appeals for the Second Circuit in *U. S. ex rel. Brensilber v. Bausch & Lomb Optical Co. et al.*, 11 U. S. Law Week 2396, on November 5, 1942, in affirming the dismissal of an action brought under R. S. § 3490, branded that statute as follows:

> "This would be the necessary result were the statute of the usual kind and entitled to a broad interpretation; but it is not, for it is not only penal, but *drastically penal.* [citing cases] For this reason it has been strictly construed. [citing cases] Furthermore, so far as it perpetuates the odious and happily nearly obsolete *qui tam* action, *it should be regarded with particular jealousy.*" (Italics added)

Other cases containing similar declarations regarding R. S. § 3490 are *U. S. v. Shapleigh*, 54 Fed. 126, 129-130, 134 (C. C. A. 8) and *Pooler v. U. S.*, 127 Fed. 519, 521 (C. C. A. 1).

Among the many cases which might be cited in support of the general doctrine that penal and criminal statutes should be strictly construed, the opinion of Chief Justice Marshall in *U. S. v. Wiltberger*, 5 Wheat. 76, 95, 96, the fairly recent opinion of this Court in *U. S. v. Scharton*, 285 U. S. 518, 521, and the language of Judge Dillon in *U. S. v. Clayton*, 25 Fed. Cas. No. 14,814, quoted in *Flora v. Rustad*, 8 F. (2d) 335 (C. C. A. 8), should suffice. The last is as follows (8 F. (2d) at 337):

> "'The doctrine is fundamental in English and American law, that there can be no constructive offenses; that before a man can be punished his

case must be plainly and unmistakably within the statute, and if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles of law admit of no dispute, and have been often declared by the highest courts, and by no tribunal more clearly than the Supreme Court of the United States. U. S. v. Morris, 14 Pet. (39 U. S.) 464 (10 L. Ed. 543); U. S. v. Wiltberger, 5 Wheat. (18 U. S.) 76 (5 L. Ed. 37); U. S. v. Sheldon, 2 Wheat. (15 U. S.) 119 (4 L. Ed. 199).'"

It should also be noted that R. S. § 3490 uses the words "forfeit" and "forfeiture" in defining what may be recovered under it (R. 407). These terms import punishment, are part of the terminology familiar in the criminal courts and are inconsistent with the recovery of mere compensatory damages. Indeed, the $2,000 "forfeiture" and the double damages are manifestly intended as punishment, go beyond mere reparation for actual injury, and are, therefore, penal in nature.

There can, of course, be no doubt about the criminal nature of R. S. § 5438. Both it and R. S. § 3490 should, therefore, we submit, be strictly construed and not extended by implication to cover situations which may appear to be analogous or equally culpable.

3. *This case is not within the first clause.*

Contrary to his course in the court below, the relator now contends that he has a cause of action under each of the first three clauses of R. S. § 5438, which is incorporated into R. S. § 3490, and divides his argument into a discussion under each of said clauses separately. Better to meet the relator's argument as now presented, we, therefore, will also consider each of those three clauses separately.

That the first clause of R. S. § 5438 requires as an essential element that the defendant present a false claim *"upon or against the Government of the United States"* is admitted in the petitioner's brief (p. 20) and is clear from the language of the statute.

The requirement that the claim must be "upon or against the Government of the United States" means that the claim must be based upon the Government's own liability to the claimant: *U. S. v. Cohn*, 270 U. S. 339. That was a criminal prosecution under § 35 of the Criminal Code for obtaining imported cigars out of a government custom house through fraudulent misrepresentations that the bill of lading had been lost, when in fact the defendant had not paid the draft which accompanied the bill of lading to a bank. A demurrer to the indictment was sustained and affirmed on appeal because the defendant's acts did not violate § 35, *i. e.*, defendant had not presented a false claim for payment against the Government. This Court said with reference to the statutory language which we are now considering (pp. 345-346):

> ". . . it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, *based upon the Government's own liability to the claimant.*" (Italics added)

In reading the opinion in the *Cohn* case it should be recalled that the "defrauding" of the Government referred to in the opinion was added to § 35 by the amendment of 1918, and was not included in R. S. § 5438.

Likewise, in *U. S. ex rel. v. Mercur Corp.*, 13 F. Supp. 742, the Honorable Robert P. Patterson, then a District Judge of the Southern District of New York, afterwards

a Circuit Judge and now Undersecretary of War, in dismissing an informer's complaint based on R. S. § 3490 because the suit was not within the purview of that section and the incorporated provisions of R. S. § 5438, said (p. 743):

> "An informer's action will therefore lie *only* in cases where the defendant has made false, fictitious, or fraudulent 'claim upon or against' the Government of the United States. This means a claim for money or property 'to which a right is asserted against the Government, based upon the Government's own liability to the claimant.'" (Italics added)

The Circuit Court of Appeals for the Second Circuit affirmed (83 F. (2d) 178) and this Court denied a certiorari: 299 U. S. 576.

Other cases to the same effect are *Olson v. Mellon, supra,* p. 948; *Mookini v. U. S.,* 95 F. (2d) 960, 961 (C. C. A. 9); *U. S. ex rel. v. Salant,* 41 F. Supp. 196, 197 (D. C., S. D. N. Y.); *U. S. ex rel. v. American Cotton Co-operative Ass'n.* (R. 433) (L. 58-272, D. C., S. D. N. Y.); *Salas v. U. S.,* 234 Fed. 842, 844-845 (C. C. A. 2); *U. S. v. McMurtry,* 5 F. Supp. 515, 516 (D. C., Ky.); and *Capone v. U. S.,* 51 F. (2d) 609, 614 (C. C. A. 7).

It being, therefore, established by all of the cases and it also appearing from consideration of the statutory language that in order to be liable under the first clause of R. S. § 5438 the defendant must have made a false *claim against the Government of the United States or some department or officer thereof,* it remains only to apply that law to the facts of the case at bar. The respondents had no contract with the Government of the United States, nor with any department or officer thereof. Neither the Government of the United States nor any department or officer thereof promised to pay the respondents anything for their electrical work. How then could the respondents have "any claim upon or

against the Government of the United States, or any department or officer thereof"?

It is not sufficient under the provisions of R. S. § 5438 that the defendants make or present claims for payment or approval to an officer in the civil, military or naval service of the United States, knowing such claims to be false, fictitious or fraudulent, *unless also those claims are "upon or against the Government of the United States, or any department or officer thereof." In the case at bar, the only claims which the respondents had and, therefore, could present, were against the local municipalities, which alone had promised or contracted to pay them* (R. 274). That the contracts with the respondent electrical contractors were simply two-party contracts between the local municipality, as one party, and the electrical contractor, as the other party, and that neither the United States of America nor any of its departments, officers or agencies was a party to said contracts, clearly appears from those contracts and is beyond dispute. (R. 274). The contracts are signed only by the electrical contractor and officers of the local municipality (R. 276). Incidentally, it may also be noted that the advertisement for bids was solely by the local municipality (R. 217-218), the bids were addressed exclusively to the local municipality (R. 225) and the performance bonds run alone to the local municipality (R. 277, 279). Everything is consistent with the whole liability for paying the contractor being solely on the local municipality.

Consequently it is immaterial whether the I-23 forms, *i. e.*, the periodical estimates for partial and final payment, had to be presented to and approved by a PWA resident engineer inspector before they were paid. At most the claim of the contractor was presented for approval *to* an officer in the service of the United States, but still the claim was not *against* such officer

or against the United States Government or any department thereof. R. S. § 5438 requires *both* the presentment of the claim to a person or officer in the service of the United States *and* that the claim must be against the Federal Government or a department or officer thereof. It is not merely a question of *to whom* something is presented; the important question is *what* must be presented. The answer: a "claim upon or against the Government of the United States, or any department or officer thereof." The subject of the pertinent sentence of the statute is "Every person"; the predicate is "makes or causes to be made, or presents or causes to be presented"; and the object of the sentence is a false "claim upon or against the Government of the United States, or any department or officer thereof." Nor is it material that the PWA approved the plans and specifications, contracts, changes and the like, exercised some watch over the construction of the improvements, audited the accounts relating to payment for the projects or did any of the other things which the relator has mentioned, because none of those acts resulted in giving the respondents "any claim upon or against the Government of the United States, or any department or officer thereof."

Assuming that there was no fraud whatever in the transaction, if one of the respondents who has not been paid in full, of whom there are several, sued the Government of the United States, or any department or officer thereof, for the balance of his contract price, would any court permit a recovery? Unless that question can be answered in the affirmative, notwithstanding that only the local municipalities ever contracted to pay the respondents, the respondents never had "any claim upon or against the Government of the United States, or any department or officer thereof" and the view of the Circuit Courts of Appeals for the Third and Fifth Circuits

in this case and *U. S. ex rel. Ostrager v. New Orleans Chapter, etc.,* 127 F. (2d) 649, is right.

What is meant by a claim against the United States was clearly defined by this Court in *Hobbs v. McLean,* 117 U. S. 567, 575, as follows:

> ". . . there was no claim against the United States to be transferred. Peck had at that time no contract even with the United States, and there was no certainty that he would have one. What is a claim against the United States is well understood. *It is a right to demand money from the United States.* Peck acquired no claim in any sense until after he had made and performed, wholly or in part, his contract with the United States." (Italics added)

The respondents never had any right to demand money from the United States or from any department or officer thereof, because they never had any contract with any of them. The respondents, therefore, never had, and consequently could not make or present, "any claim upon or against the Government of the United States, or any department or officer thereof".

The cases cited by petitioner are not in point. Indeed, it is a striking fact that *the petitioner does not cite any case anywhere in his brief in which a recovery was sustained under the informer act. Madden v U. S.,* 80 F. (2d) 672; *Langer v. U. S.,* 76 F. (2d) 817; and *U. S. v. Harding,* 81 F. (2d) 563, cited by petitioner, did not involve R. S. § 3490 or the incorporated § 5438. They were not informer actions, but purely criminal prosecutions based upon statutory provisions which *cannot* be invoked to maintain the present case. Thus, *Madden v. U. S., supra,* was a prosecution under § 28 of the Criminal Code (18 USCA § 72). The essence of the crime defined by § 28 of the Criminal Code is forgery. Section 28 of the Criminal Code, of course, is

not incorporated into R. S. § 3490. In *Langer v. U. S., supra,* the appellants were convicted under § 37 of the Criminal Code, but on appeal the judgment was reversed because the only employees assessed were those of the State and not of the Federal Government or any of the latter's agencies, and, therefore, there was no violation of any federal statute. What the petitioner quotes from this case is, therefore, dictum. More important than that, however, is the fact that this decision is based wholly on § 37 of the Criminal Code, which makes a crime of any conspiracy to obstruct the administration of any federal statute or governmental function, regardless of whether the Federal Government has sustained any pecuniary loss (see 76 F. (2d) p. 824). Section 37 of the Criminal Code is not incorporated into R. S. § 3490 and cannot support the present action. *U. S. v. Harding, supra,* also involved an indictment under § 37 of the Criminal Code (18 USCA § 88), the general conspiracy provision. The indictment was held to charge an offense because the defendants had allegedly conspired to hinder the United States "in its rights, operations, and functions" (see 81 F. (2d) p. 567). This decision is based wholly on § 37 of the Criminal Code which, as above stated, makes a crime of any conspiracy to obstruct the administration of any federal statute or governmental function, regardless of whether the Federal Government has sustained any pecuniary loss. Section 37 of the Criminal Code is not incorporated into R. S. § 3490, upon which the case at bar is expressly based, and cannot, therefore, support the case at bar. The cases principally relied upon by petitioner are distinguished by the court below in its opinion (R. 478, 127 F. (2d) 236).

U. S. v. Coggin, 3 Fed. 492, and *Dimmick v. U. S.,* 116 Fed. 825, from which petitioner also quotes, were both criminal cases in which the defendant personally had presented a fraudulent claim directly against the United States Government, for payment directly out of

the United States Treasury, and each claim was based on the Government's own alleged liability therefor. Those cases, accordingly, are essentially different from the case at bar where the respondents never had, and, therefore, could not make or present, any claim against the United States Government.

The relator now contends (p. 24) that there was a trust, in which "The chose in action of the municipality against the bank represented by the Construction Account became the trust res", and the municipality was trustee. Even if there were such a trust, which we deny, still the respondents had no "claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the" respondents—to use the language of this Court in the *Cohn* case, *supra*. *McKee v. Lamon,* 159 U. S., 317, and *Pennsylvania Steel Co. v. N. Y. City Ry. Co.*, 206 Fed. 663, cited by petitioner, simply hold that where money is specifically placed in the hands of one person to be delivered to another, the latter can force the former, the trustee, to turn the money over to him, but those cases do not hold, or even intimate, that the beneficiary could force the third party who created the trust to do so or that the beneficiary has any claim against said third party. In the case at bar said third party is the United States. On the contrary, in *McKee v. Lamon, supra,* this Court, in overruling the contention that the Choctaw Indian Nation—which there stood in the position of creator of the trust—was a necessary party to the suit, said (p. 321) that even if the Choctaw Nation was made a party defendant the complainants—who would correspond with the electrical contractors in the case at bar—would not "be entitled to any relief against the nation." In accord is *Roberts v. Calhoun County,* 45 F. Supp. 291, the other case cited by petitioner in this connection, because the contractor there, the plaintiff, was awarded only a general judgment against the

county, and the bank in which the construction account was kept was dismissed from the action over the plaintiff's contention that the money in said account should be subjected to the payment of the contractor's claim. Notwithstanding the trust theory, therefore, the respondents did not have a claim "against the Government, based upon the Government's own liability to" them and this essential element of a cause of action under the informer act would still be lacking.

The only claim of the respondents grew out of the promise contained in their contracts with the local municipalities that the local municipalities would pay them a certain sum of money for doing the electrical work on each project (R. 274). These claims were purely against the local municipalities *in personam*. No specific dollars or fund was prescribed by the respondents' contracts for their payment. Where the local municipalities obtained the funds to pay the contractors upon performance by the latter of their part of the contracts was immaterial as between the local municipalities and the contractors. The claims of the respondents were, therefore, simply *in personam* against the local municipalities, like any other contractual claim to collect a promised sum of money for certain services: *Kline v. Burke Construction Co.*, 260 U. S. 226, 228.

That there was no trust such as relator now contends is indicated by the terms of the offers from the PWA to the local municipalities. The gist of them is that the Government "offers to aid in financing the construction of" a specified improvement *"by making a grant to" the local municipality* (see Ex. 76, R. 179). The noun "grant" is defined in *Webster's New International Dictionary* (1939) as the "Act of granting" or as the "Thing or property granted; gift; boon". The verb "grant" is defined as follows:

"To bestow or confer, with or without compensation, particularly in answer to prayer or request; to give.

. . . . . .

"To give or bestow formally, usually in answer to a petition, as a privilege; to make conveyance of; to give the possession or title of, esp. by a deed or formal writing; to convey."

The language used by the Government, therefore, imports a gift rather than a trust. That such was also the understanding of the court and relator's counsel during the trial appears from the following (R. 46):

"*The Court*: . . . The grant of the Government was to the School District and not to anyone else."

. . . . . .

"*The Court*: . . . I do not see how any conclusion can be drawn from that, from what the witness has said in answer to the question propounded by Mr. Margiotti, that the money was paid to the electrical contractor by the Government, when as a matter of fact under all the evidence the grant was made to the School Board, who contracted with the contractors and raised that much money from the Government to apply on the contract. That is all I see in it.

Mr. Margiotti: That is correct."

Attention is also called to the decision of the Comptroller General of the United States rendered June 25, 1935, reported in 14 Comp. Gen. 916, the syllabus of which reads in part as follows:

"After the Federal funds loaned or granted to a State under authority of section 1 of the Emergency Relief Appropriation Act of 1935, dated April 8, 1935, are receipted for by the State they become State funds, and in the absence of a condition of the loan or grant specifically prescribed to the con-

trary, there would be no Federal law precluding a retired Marine Corps officer from holding an office or position created by a State, the salary of which is paid from the funds loaned or granted by the Federal Government."

That there was no trust is indicated also by the facts that the municipalities sometimes paid the contractors out of their own money before receiving the PWA grant and that all of the contractors had to be paid in full by the local municipality before the final installment of the PWA grant would be sent to the municipality (R. 53, 55, 112-113). In a trust the money is in the hands of the trustee before he makes any disbursement, whereas a gift to aid another in acquiring something may be made by way of reimbursement after the donee has expended his own funds therefor.

In arguing that there is a trust petitioner (p. 24) quotes part of a sentence from Form 230 requiring the grant payments to be deposited promptly in the construction account. That is bereft of significance, however, by the fact that the portion of the sentence which petitioner deletes from said quotation subjects to the same requirement of prompt deposit in the construction account the "Applicant's Funds" (R. 163). Petitioner also says (p. 25) "The required approval was in each instance given by the PWA Resident Engineer Inspector, as shown above." The same thought is repeatedly reiterated by petitioner in varying language. As pointed out in our Counter-Statement of the Case (p. 11), the Record shows that is not correct. The municipalities could and repeatedly did pay the contractors in full despite some exceptions to the PWA inspector's approval (R. 62, 101, 108-109, Ex. 245, R. 205, 207, 208, Tr. 64-65). Petitioner also says (p. 25) that "To the extent that monies received from the United States were not needed for that purpose [the project], there was

a duty to return them to the United States" unless there were outstanding bonds. There was, however, no general provision for the return of surplus money to the United States, the only provision to that effect being confined to the advance grant of 15% if the project were abandoned (R. 161).

Finally, in this connection, petitioner quotes (p. 25) a sentence from Form 230 (R. 163) providing that "Moneys in the Construction Account will be expended only for such purposes as shall have been previously specified in a signed certificate of purposes filed with and accepted by the Government." It does not follow from that provision, we respectfully submit, that the contractor had "any claim upon or against the Government of the United States, or any department or officer thereof." The "certificate of purposes" is provided for in paragraph (j) of Part I, Section 1, of Form 230 (R. 158-159). It must be filed by the local municipality when it is applying for a loan or grant, together with its plans and specifications, and sets out in detail "the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project." A similar provision is uniformly found in construction mortgages made by banks or other lenders who agree to advance their funds to the owner as construction of the building or other improvement progresses, in order that the owner will have the funds necessary to pay the contractors and materialmen from time to time. Certainly in such a case, which is well known in the business world, the contractors who do the work have no claim against the bank or other lender, either *in personam* or *in rem*. The contractor's only claim in such a case is against the owner, who alone contracted to pay him, or *in rem* by a mechanic's lien against the building or other improvement. A mechanic's lien against the physical improvement is not, of course, a right *in*

rem against money loaned to the owner by a lender or given to the owner by, say, a relative. Furthermore, public buildings and improvements, such as are involved in the case at bar, are not subject to mechanics' liens in Pennsylvania: *Henry Taylor Lumber Co. v. Carnegie Institute*, 225 Pa. 486, 74 A. 357. In the case of ordinary construction mortgage loans, it is also common for the lender to maintain inspection over the work to see that it is being done in accordance with the plans and specifications, and also to exercise some supervision over the expenditure of the funds which it has loaned to the owner, to see that they are not diverted from the project to aid in financing which they were loaned. Those additional circumstances do not change the result that the contractor has no claim against the bank or other lender and no such claim has ever been asserted so far as we have been able to ascertain.

Concluding our consideration of the first clause of R. S. § 5438, it is respectfully submitted that the respondents never had, and, therefore, could not present, any false "claim upon or against the Government of the United States, or any department or officer thereof". An essential ingredient of a cause of action under the first clause is, therefore, missing.

4. *This case is not within the second clause.*

In the court below relator did not contend that he had a cause of action under the second clause of R. S. § 5438, but relied solely upon the language of the first clause. In this Court he contends for the first time that because of the periodical estimates of the respondents for partial and final payment to them from the municipalities and because of the non-collusion certificates which in most cases, but not all, accompanied the bids to the municipalities, he has a cause of action under the second clause of R. S. § 5438.

a. *The periodical estimates.*

The second clause of R. S. § 5438 (*ante*, pp. 22-23) requires the making or using of a "false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry". The periodical estimates for partial and final payment on the I-23 forms which were submitted, usually monthly, by the contractors to the local municipalities and which were used in conjunction with the payments by the local municipalities to the contractors did *not* "contain any fraudulent or fictitious statement or entry." These periodical estimates merely showed the proportion of the contractor's work performed during the preceding month, in order that he might receive that proportion of the lump-sum price specified in the written contract previously entered into between him and the local municipality. The last sentence can be confirmed by examining the periodical estimate which is printed in the Record (Ex. 245, R. 202-207). No "fraudulent or fictitious statement or entry," we submit, is contained in that periodical estimate.

The respondents made the electrical installations on the respective projects fully and satisfactorily in accordance with their contracts, and there is no contention to the contrary. The municipalities received the electrical installations to their complete satisfaction and they paid the respondents no more than the amount specified in their contracts with them. The aggregate of the periodical estimates simply equalled the price stipulated to be paid in the respective contracts. Where then is there any "fraudulent or fictitious statement or entry" in those periodical estimates?

The only portion of the periodical estimates on the I-23 forms to which petitioner points in attempting to

find a "fraudulent or fictitious statement or entry" therein is that part of the certificate of the contractor contained in the periodical estimate which reads as follows (R. 205): "that all work has been performed and materials supplied in full accordance with the terms and conditions of the corresponding construction contract documents between" the municipality and the contractor. The "corresponding construction contract documents", we submit, means the varied and detailed specifications and provisions describing and directing how the contract shall be performed, such, for example, as the kind, number and size of the wiring, outlets, fixtures and multitudinous other equipment to be installed. Those specifications and other provisions directing how the contract should be performed were so voluminous that they were eliminated from the printed Record, but an examination of any of the original contracts, all of which are included in the certified record on appeal, will show that those specifications and provisions composed the great bulk of the contracts. When the construction work is actually being done, those specifications and provisions are of paramount importance and in paying the contractor as the work progresses the essential inquiry is whether the work performed is in accordance with the corresponding construction requirements. The clause quoted by petitioner from the contractor's certificate on the periodical estimates is manifestly designed to meet that inquiry. There being no contention that any of the items of material or work listed in those periodical estimates as having been furnished during the preceding month is not correct, or that the materials and work were not in accordance with the corresponding construction contract provisions, it is submitted that there was no "fraudulent or fictitious statement or entry" in the clause quoted by petitioner from the contractor's certificate on the I-23 forms.

To say that the portion of the contractor's certificate on the periodical estimates for payment wherein the contractor certifies "that all work has been performed and materials supplied in full accordance with the terms and conditions of the corresponding construction contract documents" refers to the direction in the "Instructions to Bidders" that in case of individual bidders the full names of all persons interested with the signer should be set forth in the bid, or that it refers to or constitutes a reaffirmation of the non-collusion certificates in those cases where such certificates accompanied the bids, as petitioner argues (pp. 32, 34), is illogical and will not stand analysis. To say that the work and materials listed on a monthly estimate as having been furnished during the preceding month were "performed and supplied in full accordance with" all persons interested with an individual bidder having been set forth in his bid, or that the previous month's work and materials had been "performed and supplied in full accordance with" a prior certificate that there was no collusion in the bidding, does not make sense. The manifest purpose of the clause which petitioner quotes from the contractor's certificate on the periodical estimates for payment was to secure that assurance and commitment that the previous month's work and materials, for which payment was then being asked, were in accordance with the corresponding provisions wherever contained in the contract documents prescribing how and where the electric wires were to be strung, the many different kinds and sizes of electric cables and wiring to be used, the kind, number and locations of the outlets to be installed, the many different types and sizes of electrical fixtures to be supplied, the precise details of the complicated switchboards which were necessary, the number, kind and capacity of motors and generators to be furnished, the intricate fire alarm and telephone systems to be installed, the rates of wages to be paid differ-

ent classes of workmen, and infinite other specifications governing the performance of the construction work and the materials and equipment to be supplied by the contractor. It was to those specifications and provisions that the above quoted portion of the contractor's certificate on the periodical estimates for payment referred.

It should be noted that the provision quoted in petitioner's brief (p. 31) that "The proposal shall be signed by the bidder or bidders with his or their business address, and shall contain the full names of all persons interested with him or them" is taken from the "Instructions to Bidders" (R. 219-220) of Exhibit 566, and that it is not contained in the periodical estimates for payment. Furthermore, the sentence quoted by petitioner from the "Instructions to Bidders" was intended simply to elicit the names of the other partners of a firm when the one who signed the bid was a member of a firm, or the others who might be part owners of a business operating under a fictitious name, or the like, but, we submit, it did not call for a listing of all of the other electrical contractors in the community as petitioner now argues. That the sentence quoted by petitioner from the "Instructions to Bidders" was intended only to elicit the names of partners and co-owners of a particular business enterprise with individual signers of a bid is corroborated by the next sentence after the one quoted in the "Instructions to Bidders", which directs how a corporation shall execute the proposal form (R. 220); and is further corroborated by the corresponding direction in the "Instructions to Bidders" on the two Airport contracts (Ex. 618 and 619), as well as other projects, which is as follows: "All bids shall be made on separate blank form of proposal, and shall be signed by the bidder or bidders with his or their business address or addresses and, *except in the case of a corporation,* shall also contain the full names of all persons interested with him or them." (Italics add-

ed) This is also corroborated by the proposal forms which were furnished by the municipalities to be used by the contractors in submitting their bids. These forms had spaces after the place for the signature of the one executing the bid to show in what capacity he signed, the name of his firm, if any, and in the case of the Airport and other projects, spaces under such headings as "A partnership composed of the following persons:" (Ex. 628).

Only the contractor who was awarded the contract and did the work received anything on account of that job. The other contractors did not receive any share of the contract price. The other contractors did not share the profit or help bear the loss on any contract; that fell solely to the contractor who did the job. The other contractors were not, therefore, "interested with" the contractor who got a job in any such sense as those terms were employed in the sentence quoted by petitioner from the "Instructions to Bidders."

The periodical estimates for payment on the I-23 forms did not, therefore, "contain any fraudulent or fictitious statement or entry" and they consequently failed to make out a cause of action under the second clause of R. S. § 5438.

In the petitioner's brief (p. 20) it is said: "By the acts of each contractor here in presenting his periodical estimates for payment (Form No. I-23; R. 190, 202) he brought himself within all three of these requirements of the first clause of the statute, * * *." Some of the respondents never presented any periodical estimates or I-23 forms. Only the respondents who performed the jobs which are involved presented any such estimates. A number of the respondents did not have any of the jobs in question. Those who received the involved contracts can be determined from those contracts themselves, all of which are included in the

record on appeal, and they are also all listed on "Plaintiffs Tabulation of Damages" (R. 331) with the exception of the Daniels Electric Construction Co., which had one of the eight jobs on which a penalty was allowed but no damages.

b. *The non-collusion certificates.*

The only other documents relied upon by petitioner to make out a cause of action under the second clause of R. S. § 5438 are the certificates of non-collusion in bidding. In the first place, it is to be observed that there were no certificates, affidavits or any other form of statement of non-collusion in at least five of the projects involved. This is admitted in the petitioner's brief (p. 7).

Even in those instances in which certificates or affidavits of non-collusion in bidding accompanied the bids, they were *not* made, or used, for the purpose of aiding the municipalities to obtain from the United States Government what the latter had agreed to grant the municipalities. The second clause of R. S. § 5438 specifically requires that the document containing the fraudulent or fictitious statement or entry must have been made by the defendant "for the purpose of obtaining or aiding to obtain the payment or approval of such claim". "Such claim" petitioner admits (p. 29) requires a claim against the United States or any department or officer thereof. The element of a cause of action under the second clause of R. S. § 5438, which is required by the words quoted in this paragraph from it, is lacking so far as the non-collusion certificates and affidavits are concerned and they, therefore, cannot sustain this action.

No certificates or affidavits of non-collusion were required by the contract between the PWA and the local municipality (Ex. 22 and 76, R. 157-184) or by any regu-

lation or law. No requirement of such certificates or affidavits by the Federal Government or the PWA has been pointed out by petitioner. When they were required by the local municipality they were, in many instances at least, kept by the local municipality and not shown to the PWA (R. 49, 51-52). When a copy of them was included in the contract documents which were submitted to the PWA for approval, the PWA's approval did *not* apply to the certificate or affidavit of non-collusion, because the approval of the PWA was limited to the contract being in conformity with the agreement between the applicant (*i. e.*, municipality) and the United States (R. 217), which latter agreement did *not* require any certificate or affidavit of non-collusion in bidding but was largely devoted to requirements regarding the hiring and compensation of labor (Ex. 22 and 76, R. 157-184). The non-collusion certificates and affidavits accompanied the *bids* and were *not* "for the purpose of obtaining or aiding to obtain the payment or approval of [any] claim" upon or against the Government of the United States or any department or officer thereof, as expressly required by the second clause of R. S. § 5438. There is *no evidence* whatever that the certificates or affidavits of non-collusion in bidding influenced or motivated the PWA in paying its agreed grant to the local municipalities in the four installments as the work progressed as provided in the contract between the PWA and the local municipalities (Ex. 22, R. 160-163).

In those instances in which no certificates or affidavits of non-collusion in bidding existed, it is obvious that the PWA could *not* have been influenced or motivated by any such certificates or affidavits in paying to the local municipalities the funds which it had promised the local municipalities to assist them in constructing those projects. The significance of the fact that there

were no certificates or affidavits of non-collusion on at least five of the projects involved is not confined to those five projects, but is proof that no such certificates or affidavits were required by the United States or the PWA and that they were not a necessary document to move the federal or PWA authorities to pay the requisitions of the local municipalities for the PWA grants which had been promised them. Whether non-collusion certificates or affidavits accompanied the bids to the municipalities or not, the construction account was audited and the municipalities' requisitions honored just the same, and the petitioner's assertion (p. 13) that the non-collusion certificate was "a material part of the documents considered in passing on the question of payment by the United States under the grant in each case" is thereby refuted. Moreover, one-third of the PWA grant, known as the "Advance Grant", could be, and usually was, paid to the municipality before bids were even solicited from the contractors, and, therefore, before any certificates of non-collusion could exist on that project (Ex. 22, R. 160).

Also contrary to petitioner's statement, in the last paragraph of his footnote No. 7 (p. 13), it does not follow from the fact that the PWA suspended payment of part of its grants to the local municipalities, when its investigators discovered the illegal bidding by the electrical industry in Pittsburgh, that the certificates of non-collusion which sometimes accompanied the bids were "a material part of the documents considered in passing on the question of payment by the United States under the grant in each case." The suspension of payments by the Government resulted wholly from the Government's discovery that the bidding had been collusive, which would be true or not regardless of whether a certificate of non-collusive bidding had accompanied the bids on any given project or not. There is no evidence or intimation anywhere that the PWA's suspension of

payments to the local municipalities was in any way due to any certificates of non-collusive bidding and the PWA would doubtless have suspended grant payments exactly as it did upon discovery of the illegal bidding even if no non-collusion certificate or affidavit had ever existed. Indeed, the explanation by the PWA for its suspension of grant payments, referred to by petitioner in said footnote, supports the position of the respondents, because the Government thereby indicated its opinion to be that the right of action against the electrical contractors is in the local municipalities.

c. *No false claim against United States.*

Another element lacking, we submit, to make out a cause of action under the second clause of R. S. § 5438 is a claim against the United States that was "false, fictitious or fraudulent." Petitioner would supply that element under the second clause of R. S. § 5438 by the requisitions of the local municipalities upon the PWA for payment of the grants. The requisitions of the local municipalities against the PWA for payment of the four installments of the grant, we submit, were not "false, fictitious or fraudulent." They contained no "false, fictitious or fraudulent" statement. Each was in strict accord with the preexisting written contract between the municipality and the United States, which fixed the different stages in the progress of the project when the grant would be paid (R. 160-163). None called for any more than the amount which the United States had agreed in said preexisting contract to give the municipality to assist it in financing what it cost the municipality to construct the project. The municipalities were entirely innocent of any wrongdoing. The claims of the local municipalities against the United States Government clearly, therefore, could not be described as "false, fictitious or fraudulent."

A "false, fictitious or fraudulent" claim upon or against the Government of the United States, or a department or officer thereof, is, we submit, as necessary under the second clause of R. S. § 5438 as under its first clause. Certainly this is so when the statute is construed strictly as the cases hereinbefore cited (pp. 25-28) hold it should be. The claim is described in the second clause of R. S. § 5438 as "such" claim. That is just a short way of specifying the same kind of a claim as is spelled out in the first clause. The kind of a claim meant by the second clause is such as is defined in the first clause. The kind of a claim referred to in the first clause is expressly defined as a "false, fictitious or fraudulent" claim upon or against the Government of the United States, or any department or officer thereof. The first clause undoubtedly could not be satisfied by an honest, *bona fide* or innocent claim; neither, therefore, can the second clause. If Congress had intended to extend the second clause to an honest, *bona fide* or innocent claim against the Government, it could easily and plainly have said so. It is not for the courts, however, to extend a "drastically penal" statute by resolving doubts in meaning against the defendant. That is the exclusive province of the Congress. "Such claim" in the second clause, therefore, should be held to require a "false, fictitious or fraudulent" claim upon or against the Government of the United States, or any department or officer thereof, just as in the first clause.

U. S. v. Miskell, 15 Fed. 369 (C. C., Ky.), is directly in point. Holding that the defendant in that case was not guilty under the second clause of R. S. § 5438 because the claim in support of which his false affidavit had been used was not shown to be false, fictitious or fraudulent, the court said (p. 370):

> "The crime created and defined by the statute and formulated in the second count of the indictment is not the making or using of a false affidavit

to obtain payment of a *claim* upon or against the government, but it is the making or using a *false affidavit*, etc., for the purpose of obtaining the payment or approval of a *false, fictitious*, or *fraudulent* claim, etc. In other words, the crime charged in the second count of the indictment under consideration is composed of two elements — *First*, a false affidavit; and, *secondly*, the making or the using of such false affidavit to obtain the payment or allowance of a false, fictitious, or fraudulent claim."

In accord is *U. S. v. Jennison*, 26 Fed. Cas. 608, 609 (C. C., Kan., Miller, C. Justice).

In *Olson v. Mellon, supra*; it was said in the opinion of the District Court, which was adopted by the Circuit Court of Appeals and a certiorari denied by this Court (4 F. Supp. at 948):

> "It will be noted that section 5438, R. S., related only to *false claims against the United States*, . . ." (Italics added)

Edgington v. U. S., 164 U. S. 361, cited by petitioner, does not decide otherwise. It expressly appears that the pension claim in aid of which the defendant there allegedly made a false deposition was a *fraudulent* claim. Thus, in the statement of that case, which was by the Court, it is stated (p. 361) that defendant's false deposition was made "in aid of a fraudulent pension claim". And in its opinion this Court said (p. 363) "We think the offence charged in the present indictment, of making a false deposition in aid of a *fraudulent* pension claim, . . .". (Italics added) Consequently, the question whether the claim against the Government need not be fraudulent did not arise in that case and was not considered or decided.

Nor do the other three cases cited in petitioner's brief (p. 36) support his would-be construction of the sec-

ond clause of R. S. § 5438 so that it would not require a false, fictitious or fraudulent claim against the United States. Thus, in *U. S. v. Ingraham,* 49 Fed. 155, affirmed 155 U. S. 434, as clearly appears from the opinion of this Court at page 435, the defendant himself presented a false and fraudulent pension claim against the United States Government, and used an affidavit in support of his said claim which he knew contained false statements. The municipalities did not do any such thing in the case at bar. In *U. S. v. Jones,* 32 Fed. 482, the defendant himself presented a false pension claim against the Government. In charging the jury the trial judge treated the claim against the Government as fraudulent if the *person presenting* the claim against the Government knew that the affidavit of his relationship to the deceased soldier, which he used to support his claim, was false. In the case at bar, on the contrary, the municipalities, which alone presented claims against the United States, did *not know* that there was anything false in any papers presented by them to the Government, if indeed there was, which we deny. In *Bridgeman v. U. S.,* 140 Fed. 577, the last case cited by petitioner in this connection, the defendant, a Government Indian agent, himself presented a false, fictitious and fraudulent claim against the Government for reimbursement of money which he allegedly had paid to two Indians, but in fact had not. In that, as in the other cases cited by petitioner, there was, therefore, no occasion to decide, and it was not decided, that an offense may be committed which violates the second clause of R. S. § 5438 if no false, fictitious or fraudulent claim has been made against the United States.

U. S. v Coggin, 3 Fed. 492; *U. S. v. Strobach,* 48 Fed. 902; *Dimmick v. U. S.,* 116 Fed. 825; and *Evans v U. S.,* 11 F. (2d) 37, also cited by petitioner in his argument under the second clause, are all cases in which the defendant personally presented a claim which he knew was

fraudulent directly to and against the United States Government. Those cases, therefore, are not in point.

For the reason then that the periodical estimates on the I-23 forms for monthly payment did *not* "contain any fraudulent or fictitious statement or entry" and the non-collusion certificates which accompanied the bids were not made or used "for the purpose of obtaining or aiding to obtain the payment or approval of" the municipalities' requisitions of the grants, or for the entirely separate reason that the claims of the municipalities against the United States were not "false, fictitious or fraudulent", which is an essential feature of the claim required by the second clause of R. S. § 5438, it is respectfully submitted that no cause of action has been made out under that second clause.

5. *This case is not within the third clause.*

Finally, petitioner briefly argues that he has a cause of action under the third clause of R. S. § 5438. No such contention was made in the court below. No cases whatever are cited in support of petitioner's argument under the third clause.

R. S. § 5438, we submit, except for the clauses at the end relating to misappropriation of military equipment of the United States, applies only when there is a false claim against the Government of the United States, or any department or officer thereof. Each of the first three clauses of R. S. § 5438 requires, we submit, a false, fictitious or fraudulent claim against the Government of the United States, or any department or officer thereof. The first clause, which is set out at length, expressly requires a false, fictitious or fraudulent "claim upon or against the Government of the United States, or any department or officer thereof". The second clause does the same, by the words "such claim". The third and last

clause also clearly means a false claim upon or against the Government of the United States, or a department or officer thereof, for the offense is conspiracy to defraud "the Government of the United States, or any department or officer thereof" by obtaining the payment or allowance of a false claim (*ante*, p. 23). The purpose and intent of the third clause, it is submitted, was to make a crime of a combination or conspiracy by two or more to do what was made a crime by the preceding two clauses when done by a single individual, *viz.*, the making of a false claim, as the context shows, against the United States or any department or officer thereof. The language of R. S. § 5438, therefore, when read as a whole, precludes its application to a false or fraudulent claim upon or against a local municipality, like a county, city or borough of one of the states.

At least the above construction is one to which the third clause is rationally susceptible. Congress has not expressly said against whom the false and fraudulent claim in the third clause must be. Petitioner contends, without supporting authority, it may be against anyone. We contend, with the support of all the cases construing the section, that because the third clause is also expressly directed at claims "to defraud the Government of the United States, or any department or officer thereof", and in the light of the whole context of R. S. § 5438, the false and fraudulent claim referred to in the third clause also means a claim upon or against the Government of the United States, or any department or officer thereof. Applying to such a situation the rule of strict construction, which the cases hereinbefore cited (pp. 25-28) hold should be applied to this "drastically penal" statute, the construction confining the third clause of R. S. § 5438 to claims against the Government of the United States, or a department or officer thereof, is the one to be adopted. If Congress had intended to extend the third clause to

claims against anyone, it could easily and plainly have done so by simply adding after the word "claim" in that clause the words "against anyone" or "whether or not against the Government of the United States, or any department or officer thereof." But Congress did not in fact do so, and it is not for the courts to extend this "drastically penal" statute, but rather to regard it "with particular jealousy." The extension of the statute is a matter for consideration by the Congress.

Cases holding that the language of R. S. § 5438 requires as an essential element of liability that the false claim be against the Government of the United States, or a department or officer thereof, will now be reviewed. These cases all refer to the whole of R. S. § 5438 and, therefore, they apply as well to the third clause of that section as to any other. Two informer actions under the same statutory provisions as the case at bar have already been cited, in each of which a certiorari was denied: *U. S. ex rel. v. Mercur Corp., supra; Olson v. Mellon, supra.* Due to the length of this brief we will not repeat the directly pertinent language which has been hereinbefore quoted (pp. 30, 51) from them, but it should be noted that in both of them it was held that a false claim against the Government of the United States was required to make out a case under R. S. § 5438.

The Circuit Court of Appeals for the Fifth Circuit has construed R. S. § 5438 the same way. In *U. S. ex rel. Ostrager v. New Orleans Chapter,* etc., 127 F. (2d) 649, 651, that court said:

> "The statutes involved must be strictly construed, and they permit recovery by an informer only when it is shown that the defendants have presented a 'claim upon or against the Government of the United States, or any department or officer thereof,

knowing such claim to be false, fictitious, or fraudulent.'"

In *U. S. ex rel. v. McMurtry*, 5 F. Supp. 515 (D. C., Ky., 1933), an informer action was brought under R. S. § 3490 against employees of the Internal Revenue Department who were alleged to have conspired with a taxpayer, whereby the Government received much less in taxes than it should have. A demurrer to the complaint was sustained on the ground that no false claim against the United States was made. The court said (p. 516):

"Prior to the amendment of October 23, 1918, it was well settled that section 35 of the Criminal Code was directed solely against those offenders who made, or caused to be made, fraudulent claims against the government."

U. S. ex rel. v. Salant, 41 F. Supp. 196 (D. C., S. D. N. Y., 1938), was also an informer's action under R. S. § 3490. The complaint alleged that by joint resolution of Congress in February, 1933, cotton belonging to the United States was given to the American National Red Cross; that the latter was a corporation created by Act of Congress; that the President of the United States was the President of said corporation; that five of the directors of said corporation were representatives of the Departments of State, Treasury, Navy, War and Justice appointed by the President of the United States; that the accounts of said corporation were audited by the United States; that the corporation performed such services as were assigned to it from time to time by the United States Government and that it rendered periodical reports to Congress; that said congressional resolution further provided that the cotton given to the Red Cross by the Government should be manufactured into, exchanged for, or sold, and the proceeds used to purchase cotton clothing and bedding to be distributed among the

destitute; that such manufacture, exchange or sale of said cotton and the purchase of clothing and bedding should be without profit to anyone; that the defendant, which operated cotton textile mills, by fraudulent misrepresentations that the goods had not been made with convict labor, when in fact they had been, and other similar misrepresentations had succeeded in making a large profit on cotton clothing sold by it to the Red Cross; and "that all forms, papers and documents used in the execution of the purposes of said resolution of Congress identified the said cotton and articles into which it was converted as United States Government property." It was also alleged in the complaint that the American National Red Cross was the agent of the United States Government in these transactions and that the defendant had defrauded the Government of the United States by fraudulent claims out of the Government's cotton or the proceeds thereof. The defendant's motion for judgment on the pleadings was granted on the ground that the complaint did not state a cause of action. In the opinion in that case the Honorable Robert P. Patterson, now Undersecretary of War, said (pp. 196-197):

> "As section 5438 stood at the time of the enactment of section 3490 it forbade the presentation of false claims against the government or any department or officer thereof, and it also forbade any agreement, combination or conspiracy to defraud the government or any department or officer thereof by obtaintaining allowance of false claims. It further forbade certain acts relative to the military or naval services, but these provisions may be disregarded for present purposes. *It follows that this action may be maintained only if the false claims alleged to have been made by the defendant were claims against the government or a department or officer thereof.*

"The Red Cross is not a part of the government, nor is it a department or officer of the government. It is an incorporated association created by act of Congress for the purposes mentioned in the act. In no sense are its funds the property of the government. In acting under the Joint Resolution of February 8, 1933, the Red Cross did not become part of the government or a department or officer of the government. Under the terms of the Joint Resolution, it merely received a donation from the Government and administered it for the purpose specified. The facts set forth in the complaint and taken as true in considering a motion to dismiss for insufficiency, while sufficient to show that the defendant made fraudulent claims against the Red Cross and thereby obtained money, utterly failed to show that the defendant did any of the acts forbidden in Section 5438. Even if the informer were correct in urging that the Red Cross while acting under the Joint Resolution should be deemed an agency of the government, the presentation of false claims to such an agency and obtaining of money on them would not be the foundation of an informer's action under the Revised Statutes. A corporation which is an agency of the government is not the government or a department or officer of it." (Italics added)

The relator then amended his complaint, but the court held the amended complaint also to be insufficient in law and granted a motion to dismiss the action. In its opinion holding the amended complaint insufficient, which opinion and the amended complaint are printed in the Record (R. 419-432), the court said (R. 431):

"In a popular sense the cotton turned over to the Red Cross might be called government cotton, just as ships owned by the Emergency Fleet Corporation were called government ships. But in a legal

sense, and it is only in a legal sense that section 5438 of the Revised Statutes can be violated, the cotton was not owned by the government."

The court then went on to say that allegations in the amended complaint to the effect that the cotton remained the property of the United States, that it was earmarked as such, and that the money collected by the defendant was money belonging to the United States and the like were mere conclusions of the pleader, not supported by the facts and, therefore, should be ignored.

The analogy between the *Salant* case and the case at bar is patent. In each the Federal Government donated money or property to a corporation, to be used by the latter for the ultimate purpose of relieving the needy. In one case this was a corporation created and dominated by the Federal Government. In the other case the grants were to local municipal corporations created by the Commonwealth of Pennsylvania. In both the defendants' contracts were with said corporations to which the Federal Government had given its money or property. If the American National Red Cross, whose chief officer was the President of the United States, five of whose directors were executive officers of the United States, whose accounts were audited by the Federal Government, which reported to Congress and which did what was assigned to it by the Federal Government, was not a part of the United States Government, or a department or officer thereof, as that phrase is used in R. S. § 5438, then how can the County of Allegheny, the City of Pittsburgh or the School District of the Township of Kennedy be deemed to be a part of the Government of the United States, or any department or officer thereof? If the cotton donated to the Red Cross became the property of the latter, why did not the money paid by way of grant by the PWA to the local municipalities in the instant

case become part of the funds of the latter? Just as in that case the only claims which the defendant had were held to be against the Red Cross, so in this case the only claims which the respondents had were against the local municipalities. And even if, as said by Judge Patterson, the Red Cross or the local municipalities were deemed to be an agency of the Government, still that would not furnish the foundation of an informer's action under R. S. § 3490 and § 5438, because a corporation which is an agency of the Government is not the Government or a department or officer of it, a claim against which is required to make out a case under said sections.

U. S. ex rel. v. American Cotton Cooperative Ass'n. et al. (L. 58-272, U. S. D. C., S. D. N. Y., 1935) is an unreported informer case also brought under R. S. § 3490. The complaint in that case set forth 17 causes of action charging that millions of dollars which had been paid to the Cotton Stabilization Corporation and the Grain Stabilization Corporation by the Federal Farm Board out of the revolving fund provided by Congress in the Agricultural Marketing Act were fraudulently obtained by the defendants through various conspiracies, misrepresentations, concealments, falsifications of bills, invoices, warehouse receipts and book entries and the like. The action was dismissed because not authorized by the informer act. The opinion in that case was written by Judge Knox, now Senior District Judge of the Southern District of New York. It is very brief and relies principally upon *Olson v. Mellon*, supra. A copy of Judge Knox's opinion is in the Record (R. 432-433). This case confirms the view that R. S. § 5438 requires, as an essential ingredient of the offense therein defined, a false "claim upon or against the Government of the United States, or any department or officer thereof" and that a false claim against a corporation to which money has been appropriated by the

United States Government, and by which claim some of that money is fraudulently obtained by the defendant, will not make out a case within the purview of R. S. § 5438.

U. S. v. Bittinger, 24 Fed. Cas. No. 14,599 (D. C., Mo., 1875). This was a criminal prosecution under R. S. § 5438. The court defined the meaning of the word "claim" as used in that section as follows (p. 1150):

> "By making a claim, as defined in this statute, is meant the asking or demanding on part of the defendant of the government payment for services."

Capone v. United States, 51 F. (2d) 609 (C. C. A. 7, 1931), certiorari denied 284 U. S. 669. Defendant was convicted of income tax frauds and this was held to have been made a crime by the 1918 amendment to § 35 of the Criminal Code (18 USCA § 80). The Circuit Court of Appeals for the Seventh Circuit, however, expressly recognized that prior to said amendment that section, which then read like R. S. § 5438, applied only to false claims against the Government. The court said (p. 614):

> "It seems quite clear, and we accept it as established, that, prior to the amendment of 1918, section 80 applied solely to those offenders who filed fraudulent claims against the government."

In *Mookini v. U. S.,* 95 F. (2d) 960 (C. C. A. 9, 1938), appellants were convicted under § 35 of the Criminal Code as amended in 1918. The defendants had presented false claims for payment to the Director of the "Schofield Camp of the Civilian Conservation Corps, United States Department of Interior". The Circuit Court reversed on the ground that no false claim had been presented against the United States Government or any department or officer thereof. The court said (p. 961):

> "Appellants assign as error the overruling of their demurrers to the indictment. The assignment

is well taken. The indictment does not allege that appellants made or presented or caused to be presented any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States was a stockholder. It alleges that they made and presented a claim upon and against the Schofield Camp of the Civilian Conservation Corps; but it does not, nor could it truthfully, allege that said camp was the Government of the United States, or any department or officer thereof, or any corporation in which the United States was a stockholder. Hence, the indictment charges no violation of section 35, supra. It does not purport to charge any other offense. The demurrers should have been sustained."

While this was a criminal case, it construes the identical language of R. S. § 5438 upon which the case at bar is based. This case is, therefore, in point. Furthermore, it could be said of that case just as much as of the case at bar that money appropriated by the Federal Government was diverted to an illegitimate end.

Other cases which tend to support the position that R. S. § 5438 applies only to false claims against the Federal Government itself are *U. S. v. Long*, 14 F. Supp. 29, 30, 31 (D. C., Mass.); *U. S. v. Ambrose*, 2 Fed. 764 (C. C., Ohio); *U. S. v. Clark*, 121 Fed. 190, 191 (D. C. M. D., Pa.); *U. S. v. Byron*, 223 Fed. 798 (D. C., Ore.); *U. S. v. Christopherson*, 261 Fed. 225, 227 (D. C., Mo.); and *U. S. v. Crittenden*, 24 F. Supp. 84 (D. C., N. Y.).

There is no case, to our knowledge, holding that the third clause of R. S. § 5438 can be satisfied by a claim against one other than the Government of the United States, or a department or officer thereof. Indeed, the only case to our knowledge in which a recovery has ever been sustained under R. S. § 3490 and the incorporated

provisions of R. S. § 5438 is *U. S. v. Griswold,* 24 Fed. 361 (D. C., Ore., 1885). In the *Griswold* case the defendant had presented directly to the United States Treasury false and fictitious vouchers or invoices purporting to be claims for supplies furnished to the United States Government to prosecute the Oregon Indian War of 1854, and had thereby obtained money directly from the United States Treasury to which he was not entitled. The *Griswold* case, therefore, clearly involved a false "claim upon or against the Government of the United States", was plainly embraced within the language of R. S. § 5438 and did not decide any question that is in issue in the case at bar.

That § 35 of the Criminal Code even as amended in 1918 did not include excessive claims against local municipalities for payment for constructing projects financed in part by PWA loans or grants to said local municipalities is the only logical inference from the fact that in 1934 that section was amended by inserting after the clause "knowing the same to contain any fraudulent or fictitious statement or entry" these words: "in any matter within the jurisdiction of any department or agency of the United States." The added clause clearly embraces such claims as described above. There would have been no use or purpose in making the 1934 amendment if the statute as it existed immediately prior thereto had already included such claims. The 1934 amendment, of course, is not to be read into R. S. § 3490 or § 5438.

The same inference must also be drawn from § 9 of the Emergency Relief Appropriation Act of 1935 (c. 48, 49 Stat. 115, 118, 4 F. C. A., Title 15, § 728 Note, pp. 688-690), which specifically makes a crime out of what the respondents did in this case. This section, as well as the pertinent part of § 35 of the Criminal Code as amended in 1934, is printed at the top of the reverse

side of the I-23 forms (R. 204). It is noteworthy that the notice on the I-23 form which immediately precedes and introduces said two criminal statutory provisions reads as follows (R. 204):

> *"The project to which the contract herein referred to relates is a non-Federal project, the construction of which the United States of America, through the Federal Emergency Administration of Public Works, is aiding the owner in financing."*

A non-Federal project means that the Federal Government was not doing the work or contracting to have it done, that the project belonged to someone else, that the Federal Government did not have control of the work and that neither the Government of the United States, nor any department or officer thereof, was subject to any claim for payment by the contractors who did the work.

Footnote No. 6 in the petitioner's brief (p. 10) says that the I-23 forms "called special attention to the fact that claims against the United States were involved, by citing federal statutes punishing presentation of false claims against the United States (R. 190, 191; 202, 204)." That statement, we submit, is erroneous. The first statutory provision quoted on the I-23 form is § 9 of the Emergency Relief Appropriation Act of 1935, referred to above (R. 191, 204). This section clearly makes a crime of many acts not requiring claims against the United States. The other statutory provision quoted is § 35 of the Criminal Code of 1909, as last amended in 1934, *supra*. The 1934 amendment to § 35 of the Criminal Code extended it to any misrepresentation "in any matter within the jurisdiction of any department or agency of the United States", thereby making a claim against the United States unnecessary. It does not follow from those two statutory provisions, therefore, that claims against the United States are involved.

That the Government took the view which we are presenting is demonstrated by the fact that in explaining its retention of unpaid portions of grants it in effect stated that action against the electrical contractor because of collusive bidding should be taken by the local municipality. Thus, in explaining the withholding of $2,500 from the School District of the City of Pittsburgh on account of the promised grant for the Arsenal School, the PWA wrote as follows (R. 47):

> "The amount of $2500 withheld from this payment is a temporary suspension pending receipt of advice as to what action the owner decides to take against the electrical contractor in relation to bid irregularities."

The term "owner" in the above quotation refers to the local municipality (R. 49-51). Similar explanations will be found with reference to suspended portions of grants on other projects (R. 47-48, and see Ex. 150, R. 195).

Petitioner says (p. 39) "The third clause of R. S. sec. 5438 is directed at any form of joint action 'to defraud the Government of the United States' in any manner through false or fraudulent claims." The gravamen of the third clause was not any conspiracy to defraud the United States by any false claim against anyone, as contended by petitioner, for that was the substance of another section of the Revised Statutes, § 5440, now § 37 of the Criminal Code (18 USCA § 88)—the general conspiracy section under which the respondents were indicted, pleaded *nolo contendere* and were fined. Such useless duplication of statutory provisions, particularly when both provisions are contained in the same enactment, which was intended to codify the laws and eliminate duplications, is not to be attributed to Congress. Here again petitioner seeks to interpret the statute liberally, when as shown by the cases heretofore cited (pp. 25-28), the act is to be construed strictly and

"with particular jealousy" in a *qui tam* action. The third clause, we submit, is directed at a combination or conspiracy by two or more to do what was made a crime by the first two clauses when done by one alone, to-wit, the making of a false claim against the Government of the United States, or any department or officer thereof.

The quotation from the *Congressional Globe* on page 40 of petitioner's brief is set forth so that it conveys the impression, to us at least, that what is quoted was said in Congress in explanation of the third clause of R. S. § 5438. Such was not the fact at all. The clause quoted by petitioner did not, as would appear from petitioner's use of it, appear in any discussion of the conspiracy provision, nor even in any explanation of the bill. It appeared in a speech in opposition to the bill and in the particular part of the speech in which the quoted words were used objection was being voiced against the provision making persons not in military service subject to a *qui tam* action for penalty and damages. The sense in which the words quoted by petitioner, which we have italicized, were used appears from the following quotation, which includes not only the sentence in which the quoted words occurred but also the preceding and succeeding sentences (*33 Cong. Globe*, Part II, 37th Congress, p. 954):

> "Are there no courts; are there no district attorneys; is the form of indictment lost; or is it taken to be understood that a man can cheat the Government with impunity, although as to all other people he is amenable to the municipal laws for preventing frauds and cheats? I have no doubt that if the officers of the Government would do their duty when a man is caught procuring money by these pretenses, and *false and forged claims in any of the thousand modes by which it may be done*, he *could be punished*. He could be now if the proper officers

were on his trail, and if the proper precautions were taken to enforce the laws we now have."

Concluding our consideration of the third clause of R. S. § 5438, it is submitted that it, like the first two clauses, properly construed, requires a false claim against the Government of the United States, or a department or officer thereof. As the court below has convincingly shown in its opinion (127 F. (2d) at 237, R. 478-479), and as we have hereinbefore (pp. 30-33) tried to demonstrate, the respondents never had, and, therefore, could not make or present for payment or approval any claim upon or against the Government of the United States, or any department or officer thereof, and no false or fraudulent claim upon or against the Government of the United States, or any department or officer thereof, was made by the local municipalities. Accordingly, petitioner has not made out a cause of action under the third clause which he now belatedly briefly mentions.

6. *No falsity in respondents' "claims".*

Even if, let us assume for the sake of argument only, the case would otherwise come within the purview of R. S. § 3490, still we submit that no "false, fictitious, or fraudulent" claim was presented for payment or approval, because the claims were strictly in accordance with the existing written contracts on the respective jobs, to receive the amounts agreed in said contracts to be paid. There is no contention that the respondents did not furnish the electrical installations on the respective jobs in full accordance with their contracts. This is not a case in which defendants, having contracts with the United States Government under which the former were to furnish services or materials to the Government, presented claims for payment or approval, falsely representing that they had furnished the services or the ma-

terials, when in fact they had not done so. Such a case would come within the purview of R. S. § 3490 and the incorporated provisions of § 5438, and is a sphere in which those statutory provisions can find full effect. The illegality in the case at bar occurred in the bidding, resulting in the price agreed in the subsequent contract to be paid for the work being higher than it otherwise would have been, but there was no false or fraudulent misrepresentation in the periodical estimates for partial and final payment, nor was there any fraud or collusion in the presentment or approval of said periodical estimates (the I-23 forms). There was no falsification or fraud in anything which occurred after the contracts were executed. The municipalities received the electrical installations in accordance with their contracts, and they paid the contractors no more than the agreed contract price. The claims for payment were for proportions of the agreed contract price as the work progressed, and the whole of the claims just equalled, and did not exceed, the price stipulated in the contracts to be paid. We, therefore, submit as an alternative reason why this case does not come under R. S. § 3490 and the incorporated provisions of § 5438, that the claims presented by respondents for payment or approval were not "false, fictitious, or fraudulent", as required by the statute.

The first clause of R. S. § 5438 expressly requires that the defendant shall have made the claim "knowing such claim to be false, fictitious, or fraudulent." The second clause of said statute, as we have heretofore (pp. 50-51) tried to show, incorporates that description of the claim by referring to "such claim". The third clause of the statute is expressly confined to a "false or fraudulent claim."

What is meant by a "false" claim against the Government by R. S. § 5438 was held in *U. S. v. Shapleigh*,

supra (p. 128), to be "an untrue claim" as a claim for more services or materials than knowingly had been furnished. A "fictitious" claim was defined in the same case, and in *Bridgeman v. U. S.*, *supra*, as follows (p. 594):

> "A fictitious claim against the government is one preferred against it for supplies said to have been furnished to the government, or for services said to have been rendered to it, no part of which said supplies or services were in fact rendered or supplied."

A "fraudulent" claim under R. S. § 5438 was defined in both of the above cases, and others[3], as "a false or fictitious claim, gotten up or contrived by some person or persons with the design or purpose to deceive or defraud the government": 140 Fed. at 594.

The claims submitted by the respondents manifestly were not "false, fictitious or fraudulent." They were not "false" because they were at the agreed price for the exact quantity of labor and materials furnished. They were not "fictitious" because they were for valuable construction work actually performed by the respondents and accepted by the local municipalities. They were not "fraudulent" because they were neither false nor fictitious. Being for full performance rendered by the respondents and accepted and retained by the municipalities, the claims for payment in accordance with the pre-existing written contracts were not false, fictitious or fraudulent claims as required by the informer act.

Since the informer act applies only to false, fictitious or fraudulent *claims*, it does not apply to collusion in bidding or misrepresentation by which a contract is secured. This is especially true when the informer act is read literally and a would-be informer is required to bring a case strictly within the terms of the statute, as

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3. *E. g.*, *Mandel v. Cooper Corp.*, 42 F. Supp. 317, 319.

the cases hereinbefore cited (pp. 25-28) hold should be done.

Many of the cases above cited[4] hold that the statutory language in question permits recovery only for a "claim", meaning a demand for money. The "claim" which the informer act requires is not, therefore, supplied by a mere offer to contract or any collusion or misrepresentation attending such offer, because they neither singly nor collectively constitute a demand for money.

This position is fully supported by the recent decisions in *Mandel v. Cooper Corp.*, 42 F. Supp. 317, and *U. S. ex rel. Beckhardt v. Rockbestos Products Corp. et al.* (Civil 19-142), the latter being an unreported case decided by the District Court for the Southern District of New York on October 22, 1942. Both of those cases were also informer actions brought under the same statutory provisions as the case at bar. Both cases were dismissed for failure to state a cause of action under R. S. § 3490 and the incorporated provisions of R. S. § 5438. In the *Mandel* case the complaint alleged that the defendants, which included all of the large tire companies, had defrauded the United States Government by collusive bidding to supply the rubber tire requirements of the Government and that the Government, therefore, had entered into contracts to pay, and had paid, substantially higher prices for its tire requirements than it would have in open and fair competition. Holding that the suit was not authorized by the statute in question, Judge Coxe said (p. 319):

> "The present action sounds in tort. It really is an action for damages for alleged fraudulent

4. *U. S. ex rel. Ostrager v. New Orleans Chapter, Associated General Contractors; U. S. ex rel. Olson v. Mellon; U. S. ex rel. v. Salant; U. S. ex rel. v. American Cotton Cooperative Ass'n.; Mandel v. Cooper Corp.; U. S. ex rel. Brensilber v. Bausch & Lomb Optical Co.; U. S. ex rel. v. McMurtry; Mookini v. U. S.; Salas v. U. S.; Capone v. U. S.;* and *U. S. v. Bittinger*, all *supra*.

representations in the procurement of contracts to supply the tire requirements of the Government during the periods in question. It is not an action for damages sustained by the Government by reason of the presentation for payment or approval of fraudulent claims within the meaning of the informer statute."

The *Rockbestos* case was a similar action against all of the large cable companies, including the General Electric Company, charging them with collusion in submitting bids to the United States Government for insulated cable, for which the Government awarded contracts to various of the defendants, and in accordance with which contracts the defendants collected directly from the Government. No opinion was written in that case. Instead, we are advised that the court dismissed the action on the strength of its opinion in *Mandel v. Cooper Corp., supra,* with leave to amend the complaint.

Also supporting this position is the well-established principle that a sales contract is valid, and the buyer cannot defend an action brought by the seller to recover the agreed purchase price, notwithstanding that the seller was a member of an illegal conspiracy to fix prices and the contract price is alleged to have been higher than it otherwise would have been on account of such conspiracy. Among the decisions so holding are *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 545, 549, 551; *Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S. 165, 172; *Geddes v. Anaconda Mining Co.*, 254 U. S. 590, 593; *A. B. Small Co. v. Lamborn & Co.*, 267 U. S. 248, 252; *The Charles E. Wisewall*, 74 Fed. 802, 803; id. 86 Fed. 671, 674 (C. C. A. 2); *Hadley Dean Glass Co. v. Highland Glass Co.*, 143 Fed. 242, 244-245 (C. C. A. 8); *International Harvester Co. v. Oliver*, 192 Fed. 59, 66-67 (C. C., Ky.); *Bell v. Lamborn*, 2 F. (2d) 205, 207 (C. C. A. 4); *Milliken-Tomlinson Co. v. American Sugar Refining Co.*,

9 F. (2d) 809, 816, rehearing denied 10 F. (2d) 973 (C. C. A. 1); *Sinclair Refining Co. v. Wilson Gas & Oil Co.*, 52 F. (2d) 974, 975-976 (D. C., S. C.). In the *Corn Products Co.* case, *supra*, this Court, in a unanimous opinion, said (p. 172):

> "* * * the right to enforce the sale did not involve the question of combination, since conceding the illegal existence of the corporation making the sale, the obligation to pay the price was indubitable, and the duty to enforce it not disputable. This is true because the sale and the obligations which arose from it depended upon a distinct contract with reciprocal considerations moving between the parties,—the receipt of the goods on the one hand and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so or some remote aid to the accomplishment of a wrong which might possibly result—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, applying them to the identical general question here involved."

The rule that a sales contract is valid and that the buyer cannot refuse payment on the ground that the contract price was increased because of a price fixing conspiracy participated in by the seller, applies whether the price fixing conspiracy is held illegal under common law principles or is expressly declared illegal and made a crime by a statute, such, for example, as the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, §§ 1-3 (15 U. S. C. A. §§ 1-3): *Connolly v. Union Sewer Pipe Co., supra*, 545, 549, 551. The test for determining whether a particular contract is valid and enforceable,

as held by this Court in the *Connolly* case (p. 549), is whether "the contracts between the defendants and the plaintiff could have been proven without any reference to the arrangement whereby the latter became an illegal combination." In the case at bar, just as in each of the cases cited in the preceding paragraph, it is clear that the contracts between the local municipalities and the electrical contractors could have been proved simply by producing those written contracts and identifying the signatures of the municipal officers and of the electrical contractors thereto, without in any way disclosing or referring to the bidding system followed by the contractors.

The principle of *Connolly v. Union Sewer Pipe Co., supra,* and the cases in its train, is not dependent upon the buyer having had knowledge of the illegal conspiracy to raise prices in which the seller was engaged, but should nevertheless be particularly applicable to the many instances in the case at bar in which the respondents furnished their labor and materials in performance of their contracts, their work was accepted and payments were made to the contractors after the indictments had been returned and filed against the respondents and their illegal bidding practice was thereby made a matter of public notoriety, if indeed it was not largely so beforehand. For example, the printed Record shows that the indictment was returned and filed on November 3, 1939 (R. 295); that the periodical estimate on the I-23 form which is printed in the Record was approved by the municipality's architect on November 13, 1939 (R. 206); was approved, except for an unauthorized alteration, by the PWA inspector on November 22, 1939 (R. 207); and paid in full by the local municipality on November 24, 1939 (R. 208). That a municipality is bound by a contract which was procured from it by fraud, if it accepts benefits under the contract after it knows, or by the exercise of reasonable diligence should know, of the

fraudulent conduct, was held in *Kentucky-Tennessee L. & P. Co. v. City of Paris*, 48 F. (2d) 795, 800 (C. C. A. 6, cert. denied 284 U. S. 638), and in *People v. Stephens*, 71 N. Y. 527, 549-550, 557.

If the contracts between the local municipalities and the respondents were valid notwithstanding the antecedent collusive bidding, as held in *Connolly v. Union Sewer Pipe Co., supra*, and the cases following it, the claims for materials furnished and work done strictly in accordance with those contracts could not be false, fictitious or fraudulent.

The statute upon which this action is predicated requires a false, fictitious or fraudulent claim. No such claim was made or presented in this case. For this reason, in addition to and independent of the reason given by the Circuit Court of Appeals, its conclusion that this action is not authorized by the informer act is right.

There are other reasons beside the one upon which the Circuit Court of Appeals relied why its decision is right. The other reasons which will be referred to in this brief were all raised below, but it was unnecessary for the Circuit Court of Appeals to pass on the others after it had sustained one in favor of the respondents. A respondent in certiorari is entitled to affirmance of the judgment upon a ground other than that adopted by the court below: *Stelos Co. v. Hosiery Motor-Mend Corp.*, 295 U. S. 237, 239; *Ryerson v. U. S.*, 312 U. S. 405, 408. As this brief is the only one we will probably have the opportunity to file, we, therefore, proceed with the presentment of those other reasons herein.

II.

Defendants Are Being Punished Twice.

The respondents have already been punished by fines in criminal proceedings for the same acts upon which the case at bar is founded. Penalties and double damages are sought to be recovered, and are included in the verdict, in the present action. To subject the respondents to penalties, forfeitures or double damages for the same offenses for which they have already been criminally punished is unlawful.

The averments of the complaint (R. 5-32) in the case at bar are in most respects literally and in all respects substantially the same as the averments of the indictments at No. 10462 (R. 301-322) to No. 10498 (R. 323-329), both inclusive. The projects upon which damages are claimed in the instant suit are all included in the indictment at No. 10462 Criminal—indeed, they are listed in the same order in both. That the issues in the present case are the same as those at No. 10462 Criminal, we have from the lips of counsel for the relator. When he offered the record at No. 10462 in evidence, he said (R. 117-118):

> "We renew our offer to prove that at No. 10462 Criminal, United States of America v. Hess and Barton, et al, each and every one of the defendants in the instant case, including the corporations, were involved in said proceeding; that the said proceeding involved a conspiracy to cheat and defraud the Government by false and fraudulent bid rigging and the submission of false claims and certificates to the United States Government, and that the projects involved were the same projects involved in the present proceeding; that the issues were the same, except that in that proceeding it was criminal in nature and this proceeding is civil; . . . ."

That the issues are precisely the same in the case at bar as those at No. 10462 Criminal is particularly patent as to the respondents Bickford, Ridinger, Sr., Ridinger, Jr., and the Iron City Engineering Company, because none of those respondents made any certificates or affidavits of non-collusion and none of them was indicted for making any such false certificates or affidavits. They were defendants only in the general conspiracy indictment at No. 10462 Criminal. The only job left in the suit on which the Iron City Engineering Company even bid (but did not get) was the Airport, and as will be seen by referring to the Iron City Engineering Company's bid on that job (part of Ex. 628), there is no certificate, affidavit or other statement whatsoever contained in it referring to any such subject as collusion with others in bidding. That the Airport is one of the cases in which there was no certificate, affidavit or other statement of non-collusion can also be verified by examining the two contracts on that project (Ex. 618 and 619) and is *admitted* in the petition for certiorari (p. 7).

A case directly in point is *U. S. ex rel. Ostrager v. New Orleans Chapter*, etc., *supra*. The District Court based its dismissal of the complaint in that case on this ground, *i. e.*, that the informer's action under R. S. § 3490 was barred because it was an attempt to punish the defendants a second time, they already having been indicted and fined for the same acts, just as in the case at bar. The District Court's opinion in that case is not reported but is referred to in the opinion of the Circuit Court of Appeals for the Fifth Circuit (see 127 F. (2d) p. 650), and is contained, we assume, in the record in that case (No. 236 in this Court). The Court of Appeals did not decide this question but did say with reference to it (p. 651):

". . . there are authorities which lend strong weight to the view that such actions while civil in

form are criminal in their nature and effect, and that a former acquittal or conviction may be invoked to bar recovery in a proceeding under the informer statutes."

U. S. v. McKee, 26 Fed. Cas. 1116 (Case No. 15688) (C. C., Mo., 1877), is a leading case on the subject. It was decided by Circuit Justice Miller and Circuit Judge Dillon, the opinion being written by the former. That was a civil action based upon R. S. § 3296 (26 USCA § 2913) to recover the penalty of double the amount of taxes on liquor out of which the Government was defrauded by means of a conspiracy between the defendant and others to withdraw said liquor from bonded warehouses without payment of the taxes. The defendant pleaded that he had previously been indicted, convicted and sentenced for the same offense under R. S. § 5440 (18 USCA § 88), which makes conspiracy to defraud the Government a crime. The Government demurred to this plea. The opinion is in part as follows (p. 1117):

"In determining the sufficiency of both these defences, it is necessary to ascertain clearly the nature of the offence charged in the indictment for which the defendant has been punished; for if it is the same offence, as defined by law, for which he is now prosecuted, and is also for the same transactions, our laws forbid that he or any one else shall be twice punished for the same crime or misdemeanor.

"In the former trial he was indicted for a conspiracy to defraud the government of the United States out of taxes due on whiskey distilled by the several parties mentioned, and that in pursuit of that conspiracy other parties than defendant—who were his co-conspirators—did unlawfully remove said whiskey.

"It thus appears that the whiskey was actually removed; that by this removal the government was defrauded of its taxes; that defendant was one of the several persons who conspired together to do this act, though it was not charged that he personally took part in the acts of removal.

"In the present case, while he is not charged with a conspiracy by that name, he is charged with aiding and abetting this same removal, and, if convicted, will be punished for the same removals.

"We are all of opinion that his joining the conspiracy, of which the purpose was to remove the whiskey, was aiding and abetting the removal which was effected by means of that conspiracy.

"How can a man more effectually aid an unlawful act than by counseling and advising its execution, and giving his influence to its support, and the best energies of his mind to devise the safest and surest means of its accomplishment? If three men agree to compass the death of another, and one of them puts their joint purpose into effect, do not the other two aid and abet the murder? and is not such an agreement also a conspiracy to murder the victim?

"We are, therefore, of opinion that if the specific acts of removal on which this suit is brought are the same which were proved in the indictment, the former judgment and conviction is a bar to the present action; and we are also of opinion that the allegations of the answer are sufficient averments that they are the same."

U. S. v. Gates, 25 Fed. Cas. 1263 (Case No. 15191) (D. C., N. Y., 1845), was a civil action under § 50 of the Act of March 2, 1799 (c. 22; 1 Stat. 627, 665), imposing a penalty of $400 for unloading goods without permit from any vessel in the United States between sunset and sunrise. The defendant pleaded that for the un-

loading of the same goods he had already been indicted, pleaded guilty and been sentenced for smuggling goods into the United States without payment of the custom duties thereon under § 19 of the Act of August 30, 1842 (c. 270; 5 Stat. 548, 565). The Government demurred. The demurrer was overruled and judgment entered for the defendant. The court said (p. 1266):

"Ordinarily mere statutory penalties are to be sued for and recovered by action of debt. 5 Dana, 243, 260; Jacobs v. U. S. (Case No. 7,157). But information will also lie, when no method is prescribed by the statute for recovery of the penalty. Adams v. Wood, 2 Cranch (6 U. S.) 336. And it would seem that the party may, at the election of the government, in place of a suit, be indicted and fined to the amount of the penalty (1 Chit. Cr. Law, 162), unless the special mode of remedy is pointed out by the statute (Bac. Abr. 'Indict,' E; Rex v. Sainsbury, 4 Durn. & E. (Term R.) 457; Hollingworth's Case, Cro. Jac. 577. If the defendant in the case had been before indicted on the 50th section and fined the amount of the penalty, and then this action for the penalty was instituted, it can scarcely be questioned that the plea sets up a complete bar to such proceeding; the averment of facts showing that the one case, in all its particulars, is involved in the other. It is laid down by Baron Gilbert that, if the party hath once been fined in an action on the statute, such fine is a good bar to an indictment, because by the fine the end of the statute is satisfied, Bac. Abr. 'Statute,' E. It appears thus to be clearly the law, when the proceedings are founded upon the same statutory penalty, that the government is restricted to a single exaction of the penalty, whether enforced by action or indictment. It is not perceived that any distinction in principle can be drawn between inflicting punishment for the same

offence, by different modes of prosecution under an enactment, or by applying to the case enactments in separate statutes, all having relation to precisely the same subject matter.

"The principle upon which the plea autrefois acquit, or autrefois convict, is founded, is that no man shall be placed in peril of legal penalties more than once upon the same accusation. . . . The government will be restricted to one satisfaction for an offence, whether the punishment be pecuniary or corporeal, unless the legislature, in explicit and in indubitable language, exact a further one."

The opinion ends as follows (p. 1267):

"The facts declared upon as the foundation for the penalty demanded by this action, then, being the same for which the defendant has already been indicted and punished, I hold that the action cannot be maintained, and that the plea is a good bar thereto, both because, the United States having obtained judgment and inflicted punishment upon the defendant for an offence, they are prohibited by general principles of law from prosecuting him again for acts constituting the same offence, or, in other words, which if proved, would call for his conviction of that offence, and because the punishment provided by the 19th section of the act of 1842 is not cumulative, and to be imposed in addition to that prescribed by the 50th section of the act of 1799, but is quoad hoc a substitution for, or repeal of, the latter."

Coffey v. U. S., 116 U. S. 436 (1886), was a proceeding *in rem* brought by the United States to forfeit liquor and distillery apparatus belonging to one Coffey, who allegedly had illicitly made the liquor and intended to defraud the Government of the tax thereon. Coffey filed a claim for the property and alleged that he had been

acquitted in a prior criminal prosecution for the same alleged acts, in which criminal prosecution all of the evidence necessary to maintain the allegations of the libel would have been admissible. This Court held that this plea was good and that judgment should be entered for the claimant, Coffey, dismissing the information or libel, and that the property should be returned to Coffey.

This Court cited with approval *U. S. v. McKee*, *supra*. The opinion is in part as follows (p. 443):

"Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant."

Boyd v. U. S., 116 U. S. 616 (1886), was a proceeding civil in form to forfeit some plate glass which allegedly had been imported without payment of the customs duty thereon. This Court reversed a judgment in favor of the United States because the claimants had been compelled to produce at the trial their invoice for the glass. Such production was held to be in violation of the Fifth Amendment to the Constitution which declares that no person "shall be compelled in any Criminal Case to be a witness against himself." Holding that the proceeding, though civil in form, was really criminal, this Court said (pp. 633-634):

> "We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal."

In the case at bar $112,000 of the verdict (R. 338) is specifically defined by the informer act (R. S. §§ 3490, 3492, 3493) as a "forfeiture", and this forfeiture is sought to be recovered by reason of offences committed by respondents. Within the exact language of this Court in the *Boyd* case, the present proceeding, therefore, though civil in form, is in its nature criminal.

U. S. v. One Distillery, 43 Fed. 846 (D. C., Cal., 1890), was a proceeding at law to forfeit a distillery and the liquor therein for failure to pay tax in violation of the Internal Revenue Law. One Young was the secretary and a stockholder in the corporation which owned and operated the distillery at the time when the tax was alleged to have been evaded. The property was now claimed by four men who had also been stockholders in said corporation but had purchased some of the property at an assignee's sale and had added other equipment thereto. The defendants pleaded *inter alia* that Young had previously been indicted, tried and convicted

criminally for failure to pay the tax. The Government demurred. The demurrer was overruled. *U. S. v. McKee, supra,* and *Coffey v. U. S., supra,* were cited as precedents. The opinion is in part as follows (p. 853):

> "The government had the right to proceed by civil action to enforce the forfeiture of the property because of the frauds, or to prosecute the parties engaged in it criminally; but for the same acts it could not do both, according to the ruling in the cases to which reference has been made. It does not seem to me to be material that Young does not here appear as a claimant. If the facts be as alleged, and upon the demurrer they are to be taken as true, the government indicted, convicted, and punished him for certain frauds committed in relation to the property in question; and for the same fraudulent acts and omissions that were introduced in proof in support of that indictment it asks the court in the present suit to decree a forfeiture of the property, the right to which accrued to the Government, as has been seen, at the time of the commission of the frauds, and when Young, as a stockholder in the corporation, was interested in every part and parcel of the property. To take the property in which he has an interest is to take his property; and, for the same acts and omissions, to punish him criminally and also take his property, is, for the same offenses, to punish him twice."

U. S. v. Shapleigh, supra (C. C. A. 8, 1893, Sanborn, J.), was a suit under R. S. § 3490 on account of allegedly fraudulent claims against the Government for materials to erect barracks. Judgment for the defendant was affirmed. In the course of an exhaustive opinion, the court said (p. 134):

> "Where provision is made by statute for the punishment of an offense by fine or imprisonment, and

> also for the recovery of a penalty for the same offense by a civil suit, a trial and judgment of conviction or acquittal in the criminal proceeding is a bar to the civil suit, and a trial and judgment for the plaintiff or defendant in the civil suit is a bar to the criminal proceeding."

U. S. v. LaFranca, 282 U. S. 568 (1931), was a civil action for taxes and penalties for selling liquor without a license. Prior to this suit the defendant had been convicted and fined in a criminal prosecution under the National Prohibition Act for the same sales of liquor. There were four items really involved; two of these were denominated as penalties charging double the amount of the tax which would have been assessed if the sales had been lawful, and the other two were also held to be penalties, though they were called taxes in the statute. It was held that none of these four items could be recovered, because they were barred by the defendant's prior punishment under the criminal law.

This Court cited with approval *U. S. v. McKee, supra*, and *U. S. v. Gates, supra*. The following are extracts from the opinion (p. 572):

> "By § 35, *supra*, it is provided that upon evidence of an illegal sale under the National Prohibition Act, a tax shall be assessed and collected in double the amount now provided by law. This, in reality, is but to say that a person who makes an illegal sale shall be liable to pay a 'tax' in double the amount of the tax imposed by preexisting law for making a legal sale, which existing law renders it impossible to make. A tax is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexi-

cography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law is settled by *Lipke v. Lederer,* 259 U. S. 557, 561-562."

(pp. 573-574):

"Respondent already had been convicted and punished in a criminal prosecution for the identical transactions set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule?

"In *United States v. Chouteau,* 102 U. S. 603, a distiller and his sureties were sued upon a bond, one of the breaches of which was that the distiller had removed spirits from his distillery without first paying the tax thereon. To this it was pleaded that before the suit was brought two indictments had been found against the distiller for the same removals, and that upon the recommendation of the Attorney General the government had accepted a specified sum in compromise and satisfaction of the indictments, which were thereupon dismissed and abandoned. The court held that the compromise was the same in principle as a conviction in the criminal proceedings, and that the action was barred; and at page 611 said:

" 'Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term "penalty" involves the idea of punishment, and its character is not changed by

the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offence with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offence. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless.'"

U. S. v. Chouteau, 102 U. S. 603, from which the immediately preceding paragraph was quoted, was a civil suit on a bond to recover the penalty of double the tax on liquor which was removed without payment of the tax. Immediately after the foregoing quotation, this Court in the *Chouteau* case concluded its opinion as follows (pp. 611-612):

"Whilst there has been no conviction or judgment in the criminal proceedings against the distiller here, the compromise must on principle have the same effect. The government through its appropriate officers has indicated, under the authority of an act of Congress, the punishment with which it will be satisfied. The offending party has responded to the indication and satisfied the goverment. It would, therefore, be at variance with right and justice to exact in a new form of action the same penalty. For, as it was justly said by this court in *Ex parte Lange,* speaking through Mr. Justice Miller, *'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence.* And, though there have been nice

questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party where a second punishment is proposed in the same court, on the same facts, for the same statutory offence. The principle finds expression in more than one form in the maxims of the common law.' 18 Wall. 163, 168." (Italics added)

In that case Mr. Justice Field for this Court also said (p. 610):

"That compromise necessarily covered the causes or grounds of the prosecutions, and consequently released the party from liability for the offences charged and any further punishment for them."

Returning to the *LaFranca* case, this Court in its opinion in that case also said (p. 575):

"The government contends that the word implies a criminal proceeding and can not be extended to include a civil action. But an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action. In the *McKee* case, *supra*, Mr. Justice Miller evidently held that opinion, since he used both the words 'offense' and 'prosecution' in characterizing the civil action there under consideration. In any event, we should feel bound to resolve a greater doubt than we now entertain in favor of that interpretation of the word so as to avoid the grave constitutional question which otherwise would arise."

The last excerpt concerned the question whether the second suit came within the purview of the word

"prosecution" in § 5 of the Willis-Campbell Act (Act of Nov. 23, 1921, c. 134; 42 Stat. 222, 223; 27 USCA § 3), which provided that all laws regarding liquor which were in force when the National Prohibition Act was passed should continue in force, except that a conviction under either of those laws should "be a bar to prosecution" for the same act under the other.

U. S. v. Jun, 48 F. (2d) 593 (C. C. A. 10, 1931), was an action at law brought by the Government to recover $1,000 under § 35 of the Prohibition Act (Act of Oct. 28, 1919, c. 85, Tit. II, § 35; 41 Stat. 305, 317; 27 USCA § 52), for illegally manufacturing liquor, and for $17.60 under § 600 of the Revenue Act of 1919, as amended in 1926 (Act of Feb. 26, 1926, c. 27, § 900; 44 Stat. 9, 104), on account of the manufacture of 2¾ gallons of liquor. The defendant pleaded that he had been convicted for the same acts under the Prohibition Act. The District Court entered judgment for the defendant on all counts and the Circuit Court affirmed, saying (p. 594):

> "The fourth cause of action is based on title 2, section 35, of the National Prohibition Act (27 USCA § 52), which imposes 'a tax . . . in double the amount now provided by law, with an additional penalty of . . . $1,000 on manufacturers.' The sixth cause of action is based upon section 600(a) of the Internal Revenue Act of February 24, 1919, as amended by the Act of February 26, 1926 (26 USCA § 245). This section imposes a tax of $1.65 a gallon on liquors manufactured between January 1, 1927, and January 1, 1928, which is the period involved in this case; the same section provides that there shall be a tax of $6.40 a gallon imposed on such liquor if it is diverted to beverage purposes. The recovery sought on the sixth cause of action is for $6.40 a gallon.
>
> "It thus appears that the government seeks to recover a penalty under both the fourth and sixth

causes of action. The sum sought to be recovered under the fourth cause of action is a specific penalty. The sum sought to be recovered under the sixth cause of action is a penalty in part, $1.65 a gallon being tax, and the balance in fact being a penalty, although described as a tax."

U. S. v. Glidden Co., 78 F. (2d) 639 (C. C. A. 6, 1935), was a civil suit to recover over $2,000,000 as taxes and interest under subdivision 4 of § 900 of the Revenue Act of 1926 (Act of Feb. 26, 1926, c. 27; 44 Stat. 9, 104) for the diversion by the appellees of denatured alcohol to beverage purposes in violation of permits issued to them under the Prohibition Act. The defendants pleaded *inter alia* that they had already been indicted for the same acts, had pleaded *nolo contendere*, and had been sentenced to pay a fine which they had done. The Government's demurrer was overruled in both courts on the ground that the present suit was for penalties and, therefore, barred by the defendants' earlier punishment. After holding that what was sought to be collected was a penalty and not a tax, the court continued as follows (p. 642):

"The answer here alleges that the offense or offenses charged in the indictment consisted of a series of acts extending over and including the same period of time as charged in the petition in the case at bar, and that every fact alleged in the present petition might have been proved under that indictment. For present purposes these allegations must, of course, be taken as true. The United States, however, contends that the Maryland conviction is no bar because it was for the crime of conspiracy, whereas the tax here imposed, even if a penalty, is based upon the commission of substantive offenses condemned by the statute, and that a plea of nolo contendere may not be asserted by a defendant as a

bar to a subsequent civil action, for it is not a plea of guilty.

"While, of course, a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy, United States v. Rabinowich, 238 U. S. 78, 85, 35 S. Ct. 682, 59 L. Ed. 1211; United States v. Stevenson, 215 U. S. 200, 30 S. Ct. 37, 54 L. Ed. 157, yet it has been held that where there has been a conviction for conspiracy, and in a later case the defendant, while not charged with the conspiracy by name, is charged with aiding and abetting the commission of the very acts which were the objects of the conspiracy, the offenses are the same, and the former judgment is a bar to the second action. United States v. McKee, 26 Fed. Cas. page 1116, No. 15,688, approved United States v. LaFranca, supra. See, also, United States v. Chouteau, 102 U. S. 603, 26 L. Ed. 246; United States v. Gates, 25 Fed. Cas. page 1263, No. 15,191. The petition here meets the tests above indicated."

With specific reference to the plea of *nolo contendere*, it was said (pp. 642-643):

"Conviction and punishment on a plea of nolo contendere has been characterized as being '"in the nature of a compromise" between the prosecutor (state) and the defendant.' Tucker v. United States, 196 Fed. 260, 267, 41 L. R. A. (N. S.) 70 (C. C. A. 7). In United States v. LaFranca, supra, the court approved the doctrine of United States v. Chouteau, supra, that a compromise is the same in principle as a conviction in criminal proceedings. Quoting from its earlier decision, the court said, inter alia: 'The term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The compromise pleaded must operate for the protection of the dis-

tiller against subsequent proceedings as fully as a former conviction or acquittal. He has been punished in the amount paid upon the settlement for the offence with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offence. To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless."

This Court denied a certiorari in the last case: 296 U.S. 652.

Judge Schoonmaker, the trial judge, held that there was no double jeopardy on the ground that the offense charged in the indictment at No. 10462 Criminal was not the same as that charged in the complaint in the instant case (R. 360). How can that be so, when it is the identically same collusive bidding of the respondents which constituted the basis of the criminal proceedings and the instant case? Counsel for the relator admitted that both proceedings involved the same acts and issues (R. 117-118). It is true that the indictment at No. 10462 Criminal did not refer to the various certificates or affidavits of non-collusion. The latter are referred to in the indictments against separate respondents at No. 10463 to No. 10498, inclusive. All of the indictments and records from No. 10462 to No. 10498, both inclusive, were offered in evidence by us (R. 126). Judge Schoonmaker, without giving any explanation, refers only to the indictment at No. 10462 (R. 358-360). Particularly under *U. S. v. Chouteau, supra,* we submit that *all* of the indictments from No. 10462 to No. 10498 are to be considered in determining whether double punishment is being inflicted for the same acts in this case, because we also offered to prove by the Special Assistant to the At-

torney General, who was in charge of all of the criminal proceedings, that an agreement was made between the Government and the defendants in those criminal proceedings that if the defendants would plead *nolo contendere* to the indictment at No. 10462 the punishment imposed by sentence at that number would be accepted as full satisfaction also of the defendants' liability under the other indictments, which latter would then be *nol. prossed*, all of the indictments being considered together and all the fines imposed at one number, rather than divided among the different numbers on the criminal docket, simply as a matter of convenience (R. 125). Such an agreement with the Department of Justice was recognized as valid in the *Chouteau* case, where no plea of any kind was entered nor any sentence imposed upon either of the two indictments involved in that case.

Even if the indictments at No. 10463 to No. 10498 Criminal could not be considered on the question of double punishment, because the records at those numbers show that those indictments were *nol. prossed*, which we do not concede, still that would not affect the question of double punishment so far as the respondents Ridinger, Sr., and Jr., Bickford and the Iron City Engineering Company are concerned. That is because those respondents never made any false certificates or affidavits of non-collusion and, therefore, all of their acts were embraced within the indictment at No. 10462 Criminal, in which specific proceeding the record shows that the defendants pleaded *nolo contendere*, and were each fined (R. 294-300).

The district judge also relies upon *Helvering v. Mitchell*, 303 U. S. 391, in rejecting our second contention (R. 360). That was an appeal from an assessment by the Board of Tax Appeals of a deficiency income tax with a 50% addition for fraud under § 293(b) of the Revenue Act of 1928 (Act of May 29, 1928, c. 852; 45

Stat. 791, 858). The defendant had previously been acquitted in a criminal prosecution under § 146(b) of the same Act for a willful attempt to evade the tax. The question was whether said former acquittal exonerated the defendant from the 50% addition. A majority of this Court held that the 50% addition was not a penalty but a civil sanction just as truly a part of the tax as interest on the tax would be. The decision was based in part upon the fact that the item in question was introduced in the Act under the heading "Additions to the Tax" and was specifically set forth in a supplement entitled "Interest and Additions to the Tax" (p. 405). The facts that the 50% addition to the tax was made assessable by an administrative agency, and collectible by distraint proceedings, were also relied upon as strong proof that Congress intended said 50% addition as a civil sanction (p. 402). If the sanction were punitive in character the defendant would be entitled to a jury trial and "the provision for collection by distraint would make it unconstitutional" (p. 402). This Court did not profess to overrule the doctrine that a civil suit for a punitive sanction is barred by a prior criminal proceeding. Demonstrative of this is the following excerpt from the opinion (p. 398):

> "Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction."

The *Mitchell* case is distinguished from the instant case by the following:

1. The amount in controversy in the *Mitchell* case was denominated as an "Addition to the Tax", not as a forfeiture, and was provided for in the same paragraph

of the statute which also provided for interest on the tax. In our case the $2,000 is specifically called a "forfeiture" by Congress (R. S. §§ 3490, 3492 and 3493), and is introduced by the clause "shall forfeit and pay" (R. S. § 3490).

2. The addition in question in the *Mitchell* case could be imposed by an administrative agency without a jury trial, whereas the amounts in controversy in our case cannot be imposed by an administrative agency, but only by a court and jury (R. S. § 3491). If the assessment may be imposed without a jury, it necessarily follows that the sanction is a civil and not a penal one.

3. The addition in question in the *Mitchell* case was collectible by distraint. If it had been a criminal sanction the provision for its collection by distraint would have made it unconstitutional. A statute is to be construed, if possible, so as to make it constitutional. The informer act, R. S. §§ 3490-3494, makes no provision for collection by distraint.

4. The addition in question in the *Mitchell* case was to a legal tax levied to raise revenue to operate the Government. The informer's act upon which the instant case is based is not a taxing statute or intended to raise money to operate the Government.

5. Taxes are levied upon legitimate business activity and are not confined to acts violative of the criminal law. Under the informer's act (R. S. § 3490) the $2,000 penalty and the double damages are recoverable only if the criminal law (R. S. § 5438) has been broken. The $2,000 penalty and the double damages may, therefore, be to help dissuade violations of the criminal law.

Upon analysis we submit that the *Mitchell* case supports our position.

The recent case of *Nye v. U. S.*, 313 U. S. 33, throws some light upon whether an exaction is civil or criminal in character. The question there was whether a contempt proceeding was civil or criminal in character. Holding that the proceeding was criminal, this Court by Mr. Justice Douglas laid down the criterion as follows (pp. 42-43):

> "As Mr. Justice Brandeis stated in *Union Tool Co. v. Wilson*, 259 U. S. 107, 110, 'Where a fine is imposed partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character for purposes of review.'"

Applying the above test to the case at bar, it is clear that since at least a part of the recovery (the $2,000 forfeiture) is imposed as punishment and not as compensation to repair an injury, the criminal feature of the case predominates and fixes its character for legal purposes.

Petitioner argues (p. 19) that one of the informer act's "objectives obviously was to reimburse the Government for the heavy expense of investigation as well as for the loss directly resulting" from the defendant's acts. It is to be remembered, however, that this is a *qui tam* action and that under R. S. § 3493 (R. 408) one-half of any recovery in this suit will go to the private relator—and this notwithstanding that "the heavy expense of investigation", which brought into the open the plight of the electrical contracting industry in Pittsburgh, was borne exclusively by the Government before the relator was in any way identified with this matter.

The respondents having already been punished for the same acts which are the basis of the instant suit, it is earnestly submitted that they cannot under the law be subjected to additional and extremely oppressive punishment in the sum of the $2,000 forfeiture for each

project and the double damages which are included in the verdict. The respondents have already paid fines of $39,150 for the self-same offenses. $112,000 of the verdict is clearly a penal sanction, because it is expressly characterized as a "forfeiture" by Congress and is expressly termed in the verdict as a "penalty" (R. 338). The double damages are also, we respectfully submit, a penal sanction because of their very nature in going beyond compensatory damages or what is needed to make the injured party whole. That the double damages are penal in character is also indicated by the fact that the predicate which introduces them in R. S. § 3490 is "shall *forfeit* and pay". "Forfeit and pay" are the exact words used frequently in the criminal courts in sentencing a defendant. The penal character of the $2,000 forfeiture and the double damages is further manifested by the staggering amount which they aggregate in this case. Together they amount to over $200,000, which is approximately four times the aggregate of the fines imposed by the District Court for the same acts. Certainly requiring defendants to pay such enormous sums could only be intended as punishment and to prevent similar violations of the criminal law in the future. Having once already been criminally sentenced and having paid the fines imposed in the criminal proceedings, the respondents under elementary principles of Anglo-Saxon law, exemplified by the Bill of Rights to the Federal Constitution, cannot be subjected to additional punishment. This is not to say that the United States and the local municipalities cannot recover all actual damages suffered by them in appropriate proceedings.

III.

Official Consent Needed.

The necessary authorization or sanction by government officials for the institution and prosecution of this suit has not been obtained or shown. The relator has not shown that he obtained the authorization or sanction of the Commissioner of Internal Revenue, of the Attorney General or of any other government official, and in fact he has not obtained any such approval. We submit that the authorization or sanction of the Commissioner of Internal Revenue and of the Attorney General is a condition precedent to the bringing and maintaining of such a suit as this.

R. S. § 3214 reads as follows:

> "No suit for the recovery of taxes, or of any fine, penalty, or forfeiture shall be commenced unless the Commissioner of Internal Revenue authorizes or sanctions the proceedings: *Provided,* That in case of any suit for penalties or forfeitures brought upon information received from any person other than a collector or deputy collector, the United States shall not be subject to any costs of suit."

The decision in *Olson v. Mellon, supra,* relied upon R. S. § 3214 as an alternative ground. Apropos this is the following in the opinion in that case (4 F. Supp. at 950).

> "We know of no rule in relation to the construction of statutes which takes the instant cases out of the purview of section 3214, Rev. St. As we interpret it, it discloses a plain intent on the part of Congress to keep all cases for the collection of internal revenue taxes, fines, penalties, and for-

feitures under the supervision of the Commissioner of Internal Revenue."

R. S. § 3214 should not be limited, we submit, to suits involving taxes. The section was expressly extended by Congress to cover as well any suit for the recovery "of any fine, penalty or forfeiture." A forfeiture is sought to be recovered in the instant suit. $112,000 of the verdict is expressly returned therein as a "penalty" (R. 338). As we have already seen, the $2,000 item is specifically described as a forfeiture by Congress in the informer's act upon which this suit is brought (R. S. §§ 3490, 3492 and 3493). R. S. § 3214, therefore, by its express terms applies to the case at bar.

That R. S. § 3214 embraces *qui tam* actions is corroborated by the fact that such actions are expressly included in the immediately preceding section of the Revised Statutes (§ 3213), which is printed in the Record (R. 418-419). R. S. § 3213 provides in part that "All suits for fines, penalties, and forfeitures, * * * shall be brought in the name of the United States, in any proper form of action or by any appropriate form of proceeding, *qui tam* or otherwise, * * *." Both R. S. §§ 3213 and 3214 were derived from § 41 of the Act of July 13, 1866, c. 184 (14 Stat. 111).

Also indicative that R. S. § 3214 applies to *qui tam* actions is the proviso regarding costs at the end of that section. The proviso begins "That in case of any suit for penalties or forfeitures brought upon information received from any person other than a collector or deputy collector, * * *" which evidently refers to *qui tam* actions.

That § 3214 and § 3490 appear under different titles in the Revised Statutes is not to be considered in con-

struing those sections because R. S. § 5600 provides as follows:

> "Sec. 5600. The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed."

That the Department of Justice should have control over all suits, such as the one at bar, to prosecute a claim due to the United States, or an offense against the Government, appears, it is submitted, to have been the intent of Executive Order No. 6166, issued by President Roosevelt on June 10, 1933, under the authority of the Reorganization Act of March 3, 1933, c. 212, § 16, 47 Stat. 1517. That executive order reads, so far as material here, as follows:

> "Section 5.—Claims by or against the United States
>
> The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States, and of defending claims and demands against the Government and of supervising the work of United States attorneys, * * * in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.
>
> As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice."

The effect of the foregoing executive order, it is submitted, is to place all prosecutions of claims and demands by, and offenses against, the Government, under the control of the Department of Justice. Such control necessarily includes the determination "whether and in what manner to prosecute." The relator in bringing such a suit as this purports to be acting for the United States. May he not, therefore, be embraced by the terms "any agency" in the above Executive Order? This construction does not require any holding that the informer act has been repealed, but merely that approval of the Department of Justice is now necessary for all prosecutions of claims by, or offenses against, the United States. That is a reasonable and salutary requirement and as applicable to an action brought under an informer statute as any other. The rule of construction applicable to such a situation, we submit, is that applied in *U. S. v. Hutcheson,* 312 U. S. 219, 235.

Following Executive Order No. 6166, issued by the President, the Act of February 10, 1939, c. 2, 53 Stat. 1, 460 (26 USCA § 3740), provides as follows:

> "No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced."

The approval of the Attorney General is now, therefore, also required for such a suit as this. Since his approval has not been shown, the suit cannot be maintained.

There are sound reasons of public policy underlying the requirements that the Commissioner of Internal Revenue and the Attorney General must approve such a suit as this. It is not necessary, however, to delve into them because Congress has clearly ordained that no suit affecting the revenue of the United States shall be

brought without the sanction of those governmental officials. There is no reason apparent to us why such requirement should not apply to suits to recover alleged excessive charges against the Government and penalties incident thereto, as well as to suits to recover taxes wrongfully withheld. In either case, the suit is to recover money owing to the Government.

The requirement for the approval of the Commissioner of Internal Revenue and of the Attorney General is particularly applicable to the case at bar. R. S. § 3492 (R. 407-408) provides that "It shall be the duty of the several district attorneys of the United States for the respective districts . . . to be diligent in inquiring into any violation of the provisions of section 3490 by persons liable to such suit, and found within their respective districts . . ., and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages." The District Attorney, with the assistance of the Department of Justice, conducted the prior criminal proceedings. After the District Attorney had thus uncovered the whole situation and the respondents had already pleaded *nolo contendere*, relator, eleven days before the date for sentencing, brought this suit (R. 2, 295-296). There is no showing that the District Attorney would not have performed his lawful duty under R. S. § 3492 or that he would not have brought suit or taken other proper measures to recover the Government's actual loss. That the verdict in this case is large will not justify an interloper without Government sanction to step in quickly and usurp the office of the United States Attorney.

If the action for recovery of the Government's damages can be taken out of its hands as in this case, the same can be done in every case. And this notwithstanding that the so-called informer who succeeds in the race to bring such a suit as this first did absolutely nothing

to aid the Government in uncovering the illegal practices and had no more right to bring such a suit than any other member of the public. Cf. *The City of Mexico*, 32 Fed. 105, 106. The ever present danger of some litigious person bringing such a suit as this will have the effect, we predict, of preventing defendants in criminal proceedings brought by the Government from pleading *nolo contendere* and will thereby handicap the Government's efforts successfully and expeditiously to terminate its investigations and to break up illegal business practices. Moreover, the danger of such suits as this, several of which, including the tire, cable and military optical instrument cases heretofore mentioned (pp. 27, 70), have been instituted since the verdict in the case at bar was returned, has become, it was stated by the Honorable Assistant Attorney General Arnold in his oral argument for the Government before the court below, an obstruction to the war production program. The construction of the statutory provisions in question for which we are contending would, therefore, be more conducive to the public welfare.

IV.

No Damages Proved.

There is not sufficient evidence, we submit, by which to assess or measure any damages. It is impossible to tell from the evidence how much the Federal Government paid out because of the offenses of the respondents which it would not have paid out in the absence of such acts of the respondents. The burden is on the plaintiff to prove the damages and to introduce the facts and data upon which the actual damages, if any, could be determined with reasonable accuracy: *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156, 165; *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 98.

The relator called a witness who was held by the court to be qualified as an estimator of electrical costs and had him testify what in his opinion would have been a fair and reasonable low bid in open competition for the electrical work on each project. The relator then deducts said estimate from the contract price at which each electric job was let, and then takes 30% or 45% (as the case may be) of the difference between the actual contract price and the relator's testimony of what a fair bid in open competition would have been and calls that the actual damages suffered by the United States Government (see "Plaintiffs Tabulation of Damages" (R. 331), which is a compilation prepared by the relator and sent out with the jury). The relator and the court below considered that sufficient evidence to prove the damages sustained by the Federal Government. We submit that this is fallacious in that it entirely ignores the specific limitation in each PWA offer of the maximum grant to a fixed sum in dollars and cents. The relator's theory would be correct if the PWA offer was simply of 30% or 45% of the actual cost of each project, or if the total actual cost was less than the originally

estimated cost on which the maximum limitation of the amount the PWA would contribute was calculated. In every case, however, after agreeing to grant the local municipality 30% or 45% of the cost of the project upon completion, there is the specific limitation "but not to exceed, in any event, the sum of $....." (R. 116-117, Tr. 64, and see Ex. 76, R. 179, and Ex. 68, 69, 70, and 72, included in the record on appeal). This limitation was enforced in practice and cannot be ignored in law.

Because of the specific limitation in dollars and cents on every PWA grant, if the cost of any project would have exceeded the total originally estimated cost, even had the electrical contract been let at the relator's estimate of a fair and reasonable low bid in open competition, still the Federal Government would have contributed just as much to that project as it actually did. Perhaps an illustration using round figures will make the proposition clearer. Assuming that the originally estimated cost of a project was $100,000, the PWA would agree to grant 45% of the cost of constructing that project "but not to exceed, in any event, the sum of" $45,000. When the project is actually constructed, however, let us assume its total cost amounts to $115,000. Notwithstanding the project costs $15,000 more than originally estimated, the PWA pays the local municipality only $45,000, the maximum placed upon its offer. Now let us further assume that the electrical part of the project was let for $20,000, but the relator's evidence is that in open competition a fair and reasonable low bid for the electrical work would have been $12,000, or $8,000 less than was actually paid for the electrical work. Deducting the said $8,000 from the total cost of $115,000 still leaves $107,000 as the amount which the project would have cost in the absence of any collusive bidding for the electrical work. Since $107,000 still ex-

ceeds the originally estimated cost of $100,000, the PWA would have contributed the same amount, *i. e.*, $45,000, as it actually did when the electrical contract was $8,000 more than it should have been. In this case then, whether there was collusive bidding or not among the electrical contractors, the PWA would have contributed exactly the same amount to the construction of the project and, therefore, the Federal Government did not suffer any damage in that instance by reason of the electrical contract having been increased $8,000 by collusive bidding.

The proposition under consideration may be demonstrated not only by hypothetical examples but also by a few projects involved in this case as to which there is sufficient evidence in the record. As set forth in the statement of the case[5] Snowden Township School District actually received only $23,727 from the PWA (R. 102), which was 45% of the originally estimated cost of the school of $52,727, and the maximum amount of the PWA offer (Tr. 294). The actual cost of the school, however, was $62,633.15 (Tr. 297), 45% of which actual cost is $28,184.92. The electrical contract on that school was actually let for $4,200, but would have been let according to the relator if there had been no collusion for $3,539.68 or $660.32 less than the figure at which the electrical contract was actually awarded [see "Plaintiffs Tabulation of Damages" (R. 331)]. Subtracting the alleged excess in the electrical contract of $660.32 from $62,633.15, the total cost of the school, leaves $61,972.83 as the amount which the school would have cost in the absence of collusion among the electrical contractors. But even if the school had only cost $61,972.83, the PWA would still have paid to the School District the sum of $23,727, the amount which it actually did pay, because even without the alleged excess

5. *Supra*, p. 6.

in the electrical contract the school would still have cost more than the originally estimated cost of $52,727. In this case it is, therefore, certain that the United States Government did not lose a cent by reason of the respondents' acts.

The Miller School erected by the School District of the City of Pittsburgh is another example. As will be seen from Exhibit 72, which is included in the record on appeal, the grant there was of 45% of the cost of the school "but not to exceed, in any event, the sum of $101,541." By reference then to Exhibit 26, also in the record on appeal, it will be seen that the amount actually paid by the PWA to the Pittsburgh School District was $101,541, though the Miller School actually cost to construct a total of $289,879.69, as against an originally estimated cost of $225,647 (the last figure may be obtained either by determining the amount of which 45% is $101,541 or by adding the PWA grant of $101,541 to the estimated cost to the School Board of $124,106). Now referring to "Plaintiffs Tabulation of Damages", on which the Miller School is the first project, it will be seen that the electrical contract was for $24,152, whereas if there had been open competition according to relator it would have been $14,023.10, or $10,128.90 less (R. 331). Finally, subtracting the alleged excess in the electrical contract of $10,128.90 from $289,879.69, the actual total cost of this school, leaves $279,750.79, which is still much above the originally estimated cost of $225,647. In the case of the Miller School it is also certain, therefore, that the United States Government would have contributed no less even though the electrical contract had been awarded at the figure which the relator says would have been fair.

The same applies to the Crescent School. The PWA offer to aid in financing that school was 45% of the cost upon completion "but not to exceed, in any event, the

sum of $244,737" (Ex. 70). The latter figure was also the exact amount received by the Pittsburgh School Board from the PWA on account of this school (Ex. 26). The actual total cost of constructing this school was $600,281.20 (Ex. 26). The electrical contract on this school was for $34,940, whereas it should have been according to the relator $20,342.73, or excessive to the extent of $14,597.27. Subtracting the alleged excess of $14,597.27 from the actual cost of $600,281.20 leaves $585,683.93, which the school would have cost according to the relator if there had been no collusive bidding for the electrical contract. 45% of the latter figure is $263,557.77, or still some $18,000 more than the PWA actually paid the School District for the Crescent School. In other words, in this case also the PWA would have contributed exactly the same amount which it did had the electrical contract been let under perfect conditions. The Federal Government, therefore, could not have lost a cent on the Crescent School by reason of the respondents' collusive bidding.

The same formula applies to every one of the 48 projects on which damages were allowed by the trial judge. It not only applies in instances like the above where the actual total cost of constructing a project exceeds the originally estimated cost by more than the alleged excessiveness in the electrical contract, but also to cases where but for the alleged excessiveness in the electrical contract the project would have been completed at less than the originally estimated cost. In the latter instance, the Federal Government could not suffer damages to the extent of 30% or 45% of the alleged excessiveness in the electrical contract, as claimed by the relator, but only at most 30% or 45% of the amount by which the alleged excessiveness in the electrical contract exceeded the amount by which the actual total cost of the project overran the originally estimated cost

of that project. In other words, the Federal Government could suffer damages of 30 or 45% of that portion only of the alleged excessiveness of the electrical contract which brought the cost of the whole project to the fixed limit of the Government's grant, *i. e.*, to the amount beyond which the Government would contribute no more.

In the above instances and a few others the necessary facts to determine whether the PWA paid more to the local municipality than it would have if the electrical contracts on those respective jobs had been let at the figures at which they would have been according to the relator in the absence of collusive bidding, are in the record, but as to the other projects, which include most of the 48 on which damages were allowed by the trial judge, there is no evidence of the total amount which each project actually cost when completed and it is, therefore, impossible to tell whether the Federal Government actually paid out more money with reference to them than it would have in the absence of collusive bidding. The burden of proving the damages incumbent upon the plaintiff cannot be met merely by evidence that the electrical contract was excessive by a given amount.

The trial judge rejected this contention saying (R. 370): "We cannot follow this argument. Whatever the cost of the entire project may have been, the Government would be damaged so far as the electrical contracts are concerned, to the extent that it contributed to them in excess of what it would have been required to contribute, had there been open and fair competition." With all due deference to Judge Schoonmaker, we submit that his answer is merely begging the question. We are not disputing that the Government would be damaged to the extent that it contributed to the electrical contracts in excess of what it would have been required to contribute if there had been open and fair competi-

tion. Our point is that there is not sufficient evidence to prove to what extent, if any, the Government contributed to the electrical contracts in excess of what it would have been required to contribute if there had been open and fair competition. This contention Judge Schoonmaker does not answer.

On this question of the sufficiency of the proof of the damages, Judge Schoonmaker also dwells at length upon the rule for measuring the damages which he adopted, viz., "The damage to be recovered, therefore, would be the money which the Government contributed to each project in excess of what it would have paid, had there been fair and open competition" (R. 369). We have raised no question about that being the proper measure of damages. The rule for measuring the damages is one thing, but whether there is sufficient evidence to prove the legally recoverable damages is quite another thing. Our position is that there is not sufficient evidence by which to tell how much, if anything, "the Government contributed to each project in excess of what it would have paid, had there been fair and open competition." That cannot be told without showing the actual total cost of each project when completed and that the alleged excessiveness of the electrical contract exceeds the amount by which the total cost of the project overruns the originally estimated cost of the project, and if so by how much, or that the actual total cost of the project when completed was less than the originally estimated cost. If no damages have been proved, the judgment of the Circuit Court of Appeals should be affirmed. It may, however, be mentioned that the proposition considered in this subdivision of our brief was presented to the trial judge in our request for charge to the jury No. 7 (R. 335). That point was refused by the trial judge and that action of his constitutes the 11th reason in our motion for a new trial (R. 342).

V.

Evidence of Actual Cost Admissible.

If this Court agrees with any one of the preceding four points, it will not be necessary to consider any of the remaining questions. If all of the preceding arguments were rejected, however, we submit the respondents would be entitled to a new trial for any one of the reasons briefly presented herein under Points V, VI and VII. What follows in this brief is included not because of any lack of confidence by us that the judgment of the Circuit Court of Appeals should be affirmed, but simply because all of our arguments must be presented in one brief.

The principal evidence which the respondents intended to introduce on the question of damages consisted of the actual cost of doing the electrical work on the projects in question. The respondents offered to prove such actual costs and that such costs were fair and reasonable and the lowest prices at which the work could be done in accordance with the respective contracts. All of this evidence was excluded (R. 120-123). We submit that was substantial error.

The actual cost of doing a job is the best evidence of what a reasonable price for that work would have been. That is because it was only natural for the respondent who was awarded the contract at a fixed price on each project to buy the materials and equipment at the lowest possible prices and to use as little labor as possible. What better guarantee could there be that the actual costs represented the fair and reasonable price for each job than the incentive of the contractors to make as much profit for themselves as possible, which they would do by keeping the actual cost of completing each project as low as they could? While there may be

some variation in prices of labor and material between the time of bidding and the doing of the work, the variation in the space of time which elapsed in this case would not be sufficient, we submit, to justify rejecting evidence of costs, particularly when we offered to follow the evidence of actual costs with other evidence that the actual costs were fair and reasonable and the lowest prices at which the work could be done. Stock articles and labor were relatively stable in price during the period from 1935 to 1939, inclusive, and it is common experience that the price of standard material like wire, conduit and outlet boxes, as well as labor, does not fluctuate drastically or suddenly. As for the special equipment, the contractors had to obtain quotations for it from manufacturers or distributors before making up their bids, so that there could be no variation as to such equipment between the time of bidding and doing the work. Such variations as there may be in prices of electrical equipment and labor over a period of months result in much less uncertainty or basis for rejecting the actual costs as a criterion of what would have been a fair bid, we submit, than the professed opinion of a witness who can qualify as an estimator, but who made his estimates solely for the purpose of testifying in a law suit and who was in no danger of being called upon to do the work at the figure testified to by him. Opinion evidence is the lowest and most unreliable form of evidence. If it was admissible in this case *a fortiori* should the actual costs have been admitted.

Authority for admitting actual costs as evidence of the fair and reasonable costs of doing certain work will be found in *Prudence Co. v. Fidelity & Dep. Co.*, 297 U. S. 198; *Bates v. Carter Construction Co.*, 255 Pa. 200, 209, 99 A. 813; *Burke v. Pierce*, 83 Fed. 95; *The Scythian*, 83 Fed. 1016; *The Lucille*, 169 Fed. 719; *The Rosalie Mahoney*, 297 Fed. 294; *Travelers Indemnity Co. v. Ply-*

mouth Box Co., 99 F. (2d) 218; *Sheldon v. Wood*, 15 N. Y. Super. Ct. 267, affirmed *sub nomine Byxbie v. Wood* in 24 N. Y. 607; *Lewis v. Utah Construction Co.*, 10 Idaho 214, 77 P. 336; *Union Water Co. v. Los Angeles*, 184 Cal. 535, 195 P. 55; *Bacigalupi v. Phoenix Building & Construction Co.*, 14 Cal. App. 632, 112 P. 892; *Portland Pulley Co. v. Breeze*, 101 Ore. 239, 199 P. 957; *Wiley v. Dean Land Co.*, 171 Ia. 75, 153 N. W. 145; *S. E. Express Co. v. Chambers*, 33 Ga. App. 44, 125 S. E. 507; and *DeMoville v. Merchants & Farmers Bank*, 233 Ala. 204, 170 S. 756. In *The Albert Dumois*, 177 U. S. 240, 255, this Court said that the original cost of a boat and the amount at which the owner had contracted to sell an interest therein were better evidence of the actual value of the ship "than the conflicting opinions of experts more or less friendly to the owner." While some of the above cases are contract ones, others are based upon torts, so that they cannot be distinguished by the generality that the rule for which we contend is confined to breach of contract cases.

Neither the District Court nor the relator has as yet cited any authorities for excluding the actual costs as evidence. This question of evidence should not be confused with the substantive rule for measuring the damages in this case, as the relator has been wont to do. Judge Schoonmaker's opinion contains no reasoning to show how he arrived at his conclusion that "The actual cost to defendants of doing the work can have no bearing on that issue" (R. 374). The issue referred to was whether the Government had been damaged (R. 374). If the prices specified in the electrical contracts in question were fair and reasonable, we submit, the Government sustained no damage. And whether those prices were fair and reasonable would be most persuasively proved by the actual cost of performing those contracts. The actual cost to respondents of doing the

work, therefore, does have a very forceful bearing on the issue. In other words, the respondents are charged with having made unreasonable profits on 48 jobs. To determine whether they did so, would it not be helpful to know how much profit (or loss in some cases) they actually did make on those projects?

The evidence which the trial judge refers to as having been introduced by the respondents to show that the bids submitted by them were fair and reasonable (R. 374), was merely the opinion evidence of a qualified electrical estimator of what a fair bid in open competition for each job would have been. The fact that the respondents were permitted to introduce some evidence on the question of damages, will not cure the error in excluding other competent evidence offered by them, particularly when the excluded evidence is of a higher probative value and might well have been convincing to the jury. As it was, the jury was left to choose between the opinions of two so-called experts, with nothing in the nature of actual facts to guide them.

We also submit that the evidence of the actual cost of performing the contracts was admissible for the purpose of mitigating the damages. The trial judge summarily rejected this argument apparently for the reason that the respondents were "wrongdoers" (R. 374). Nevertheless, the respondents did furnish the labor and materials required to perform their contracts and otherwise fulfilled their contracts without any complaint or deficiencies and valuable schools, municipal buildings, water treating plants and the like have been acquired by the local municipalities. We submit our case is analogous to *Smothers v. Cosgrove-Meehan Coal Co.*, 264 Ill. App. 488, in which a defendant who was held liable for wrongfully entering and mining coal was permitted to show the actual cost of loading and hauling the coal to the foot of the shaft and of hoisting and dumping it into cars in reduction of the damages.

VI.

Character Evidence Competent.

The respondents offered to prove by competent witnesses that their reputations for honesty, fair dealing and integrity and being law-abiding citizens was very good, but all such evidence was excluded on the authority of *Helvering v. Mitchell, supra* (R. 123-124). In his opinion denying the respondents a new trial, Judge Schoonmaker dismissed this question with a single sentence, stating in effect that this suit was for a civil sanction (R. 385). Whether character evidence is admissible in this case depends upon whether this suit is merely for a civil sanction or in part to recover a penal sanction. The $2,000 forfeiture and the double damages constitute, we submit, a penal sanction, intended for punishment and not only reparation. If so, character evidence was admissible and *Helvering v. Mitchell, supra,* is an authority in our favor.

A case directly in point, holding that a suit under R. S. § 3490 is for a penal sanction and, therefore, subject to the rules of criminal procedure, though the action is civil in form, and that character evidence is admissible in such a suit, is *U. S. v. Shapleigh, supra.*

In addition to the *Shapleigh* case, there are also *Olson v. Mellon, supra,* and the other cases hereinbefore cited (pp. 25-27) holding that R. S. § 3490 is penal in character.

Attention is called to our prior argument (p. 96) to show that this suit is in part at least to inflict penalties as punishment for illegal acts. We have also hereinbefore (pp. 93-94) attempted to show why the sanction involved in *Helvering v. Mitchell, supra,* was civil in character, and how it differs from the sanctions sought to be recovered in the case at bar.

VII.

Prejudicial Argument to Jury.

As a final reason for a new trial the respondents submit that the relator's counsel indulged in unfair, prejudicial and illegitimate argument in his closing address to the jury. In that address relator's counsel in substance argued that the respondents' plea of *nolo contendere* in the criminal proceeding was inconsistent with their attempt to escape liability in the case at bar and amounted to an admission of their liability in the instant case (R. 127-129). It is settled that the plea of *nolo contendere* cannot be used as an implied admission of liability in a subsequent civil action: *Tucker v. U. S.*, 196 Fed. 260, 262; *Ferguson v. Reinhart*, 125 Pa. Superior Ct. 154, 159, 190 A. 153. This argument of relator's counsel was, therefore, contrary to law. Obviously it was also prejudicial. Where an unfair argument such as this is made by counsel in his closing address to the jury a new trial should be granted: *N. Y. C. R. R. Co. v. Johnson*, 279 U. S. 310; *Connelly v. Pgh. Rys. Co.*, 230 Pa. 366, 79 A. 635.

This unfair argument of relator's counsel cannot, we submit, be justified by what respondents' counsel said to the jury. In opening respondents' case to the jury counsel told them that the respondents proposed to show that they had already been criminally prosecuted for the same offenses, that they had pleaded *nolo contendere* to the criminal indictment, had been sentenced and had paid the fines imposed upon them, and that they could not, therefore, be punished a second time for the same acts. That simply outlined to the jury some of the evidence which the respondents intended to offer and gave the jury the necessary insight to understand the import of the records in the criminal proceedings and Special Assistant Attorney General Andrews' testimony when

they were offered in evidence. That statement of defense counsel was, therefore, we submit, perfectly proper. In their closing argument to the jury, defense counsel simply explained why some of the promised evidence had not been introduced and added that no admission of liability was to be implied in the instant case from the fact that the respondents had pleaded *nolo contendere* in the criminal proceeding, which was based on different statutory provisions than the case at bar. We said that because the criminal proceeding had been several times alluded to during the trial and the newspapers during the protracted trial had often reiterated that the respondents had pleaded *nolo contendere* in the criminal case. We were, therefore, apprehensive that the jury might draw an improper inference from that termination of the criminal case. What we said was in full accordance with the law, i. e., that the plea of *nolo contendere* cannot be used as an implied admission of liability in a subsequent civil action. It is also correct that the indictment to which the respondents pleaded *nolo contendere* was drawn under § 37 of the Criminal Code (18 USCA § 88): the general conspiracy statute which does not require any pecuniary loss to the Government and is derived from R. S. § 5440. The other indictments were drawn under the 1934 amendment to § 35 of the Criminal Code (18 USCA § 80), which is materially different from R. S. § 5438 in that said amendment of 1934 extends § 35 of the Criminal Code to a misrepresentation in any matter within the jurisdiction of any agency of the United States. We submit, therefore, that there was nothing in what we said for relator's counsel to answer; that we did not thereby waive any rights; that the aforesaid arguments of relator's counsel were highly improper and prejudicial; and that the respondents are entitled to a new trial for that reason, if the judgment of the Circuit Court of Appeals is not affirmed.

VIII.

Only One $2,000 Penalty Recoverable.

Finally, if the judgment of the Circuit Court of Appeals were reversed and a new trial denied, we submit that only one penalty or forfeiture of $2,000 may be included in the recovery in any single case brought under R. S. § 3490. The verdict and judgment of the District Court in this case included $112,000 by way of penalties (R. 338, 389). R. S. § 3490 is quoted *ante*, p. 22.

It should be particularly noted that the statute does not say that the offender shall forfeit and pay $2,000 for each violation of § 5438. Attention is also called to the fact that the plural "acts" is used in the clause "who shall do or commit any of the acts prohibited by any of the provisions of section 5438", which means, as we interpret the language, that if the defendant commits one or more acts violative of R. S. § 5438, he shall in either event forfeit and pay "the sum of $2,000" and double damages. Moreover, in the last clause of R. S. § 3490 the singular "forfeiture" is used, which is not grammatical if more than one forfeiture can be recovered in the same suit. The forfeiture is also referred to in the singular in § 3492 and § 3493, in speaking of suits against offenders and how the recovery shall be shared (R. 408). In the same places the damages are always referred to in the plural. If it had been the intention of Congress that the $2,000 forfeiture shall be multiplied in each suit by the number of acts which the defendant had committed in violation of § 5438, the words "or forfeitures" or some similar language should have been inserted after the word "forfeiture". Under the strict construction which is to be placed upon the informer act, as held in *U. S. ex rel. Brensilber v. Bausch & Lomb Optical Co. et al.*, and other cases, *supra* (pp. 25-28),

only one forfeiture of $2,000 should be allowed in each suit.

The first two points in the respondents' requests for instructions to the jury were as follows (R. 334):

> "1. If you find for the plaintiff, there can be only one penalty or forfeiture of $2,000 included in your verdict in this case.
>
> 2. Each defendant in this case can be held liable only for the damages, if any, which were sustained by the Federal Government on jobs on which that particular defendant bid or on which he refrained from bidding because of conspiring with others."

Both of the above points were refused. That refusal is complained of in the fifth and sixth reasons for a new trial (R. 341). We respectfully submit that both of those requests for charge could not consistently be refused; they are antipodal and either one or the other should have been granted.

The relator argued for, and the case was tried on, the theory that there was but one conspiracy involved in the case. Otherwise, much of the evidence would not have been admissible against all of the respondents. The refusal of the respondents' second point for charge quoted above and the fact that the trial judge in effect instructed the jury to return a joint verdict against all of the defendants, except such defendants as the jury might excuse altogether, could only be on the theory that there was but one conspiracy embracing the several projects and that each project did not constitute a separate conspiracy or offense. To be consistent, therefore, only one $2,000 forfeiture should be allowed in this case.

There is no practical or equitable reason for allowing $112,000 in penalties in addition to the double

damages. Under the informer act the relator is entitled to one-half of the damages, which half in this case if his judgment is sustained except for this point, will amount to over $100,000, and his costs. Is that not sufficient reward for him? The $2,000 forfeiture may have been intended for cases in which the damages were very small, so that one-half of them would not have compensated the relator. In such a case the $2,000 penalty would assure the relator of getting at least $1,000 in addition to his costs, but that does not apply to the case at bar in which the jury allowed $203,100.91 by way of damages.

We have found no case in which more than one $2,000 forfeiture was recovered under R. S. § 3490. We challenged the relator in the courts below to cite any such case, but still he did not do so.

No new trial is needed to correct this error. If we are wrong in every other argument, this error can be remedied by reducing the judgment by $110,000 to $205,100.91.

Conclusion.

To summarize, we respectfully submit that the judgment of the learned Circuit Court of Appeals is in accordance with law, public policy, right and justice and should be affirmed for any one or more of the following reasons: (1) there is no statutory authorization for this action; (2) to sustain a recovery in this action would subject the respondents to double punishment for the same offenses, which is contrary to law; (3) the sanction of the Commissioner of Internal Revenue and of the Attorney General is a condition precedent to the bringing and maintaining of such a suit as this, but in this case the sanction of neither has been obtained; (4) because of the specific maximum limitation in dollars and cents

upon each PWA grant there is not sufficient evidence by which any damages can be calculated or recovery sustained. If the learned Circuit Court of Appeals was wrong and if each and all of the reasons outlined above in this paragraph is unsound, then we respectfully submit that the respondents are entitled to a new trial for any one or more of the following reasons: (1) evidence to prove the actual cost of performing each of the contracts in question and that the actual costs were fair and reasonable and the lowest prices at which the work could be done in accordance with the contracts was competent and to exclude it was error; (2) character evidence is competent in such a case as this and to exclude it was error; (3) counsel for the relator in his closing address to the jury indulged in unfair, prejudicial and illegitimate argument. In any event, if the learned Circuit Court of Appeals was wrong and if we are wrong on each and every other question, we respectfully submit that only one $2,000 penalty is recoverable in a single action under R. S. § 3490 and that, therefore, the judgment of the District Court would have to be reduced by $110,000. We earnestly pray, however, that the judgment of the learned Circuit Court of Appeals be affirmed.

Respectfully submitted,

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Counsel for Respondents.

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DEC 8 1942

Nos. 173 and 236

In the Supreme Court of the United States

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, EX REL. MORRIS L. MARCUS AND MORRIS L. MARCUS IN HIS OWN BEHALF, PETITIONERS

v.

WILLIAM F. HESS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA EX REL. SAMUEL OSTRAGER AND SAMUEL OSTRAGER IN HIS OWN BEHALF, PETITIONERS

v.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 173

UNITED STATES OF AMERICA EX REL. MORRIS L. MARCUS AND MORRIS L. MARCUS IN HIS OWN BEHALF, PETITIONERS

v.

WILLIAM F. HESS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 236

UNITED STATES OF AMERICA EX REL. SAMUEL OSTRAGER AND SAMUEL OSTRAGER IN HIS OWN BEHALF, PETITIONERS

v.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

On October 12, 1942, this Court granted the petition for writ of certiorari in each of the cases

now at bar and requested the Solicitor General to file a brief amicus curiae. This brief is filed pursuant to that request.[1]

OPINIONS BELOW

The opinion of the circuit court of appeals in No. 173 (R. 471) is reported in 127 F. (2d) 233. The opinion of the district court denying motions for a new trial and judgment n. o. v. (R. 346) is reported in 41 F. Supp. 197.

The opinion of the district court in No. 236 (R. 81), sustaining demurrers to petitioner's complaint is not reported. The opinion of the circuit court of appeals (R. 114) is reported in 127 F. (2d) 647.

JURISDICTION

The judgment of the circuit court of appeals in No. 173 was entered on March 23, 1942 (R. 485). Petition for a writ of certiorari was filed on June 23, 1942, and allowed on October 12, 1942 (R. 546).

The judgment of the circuit court of appeals in No. 236 was entered on April 15, 1942 (R. 118). Petition for a writ of certiorari was filed on July 15, 1942, and allowed on October 12, 1942.

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[1] By filing this brief the United States does not waive any rights which it may have to share in the judgment secured in No. 173, if the decision of the court below is reversed. Neither does it relinquish any rights that may have accrued in its favor in No. 236, or waive any claims which it may have against respondents in either case in its own name.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the act of February 13, 1925.

QUESTIONS PRESENTED

In this brief we have considered only the questions which seemed to be of substance and of public importance. The questions considered are:

1. Whether a private individual is authorized to institute and maintain a suit for double damages and penalties under R. S. 3490–3493 based on facts revealed in an indictment returned by a federal grand jury after a Government investigation.

2. Whether the respondents in either case have engaged in transactions which constitute a violation of R. S. 5438.

3. Whether the respondents are subjected to double jeopardy by a suit for double damages and penalties under R. S. 3490–3493 after they have been indicted for the same transactions and fines have been imposed by the district court.

STATUTES INVOLVED

The statutes primarily involved are R. S. 3490–3493, 12 Stat. 696 (31 U. S. C. 231–234) and R. S. 5438, 12 Stat. 696. These statutes have been printed as an appendix to this brief, together with the Conspiracy Act (Criminal Code, Section 37, 18 U. S. C., Section 88) and Section 9 of the Emergency Relief Appropriation Act of 1935 (49

Stat. 118), which are pertinent to the question of double jeopardy.

STATEMENT

The suit in No. 173 was commenced by the petitioner Marcus in his own behalf and in the name of the United States pursuant to R. S. 3490–3493, on January 25, 1940, to recover damages and penalties allegedly due the United States for violation of R. S. 5438 (R. 5–32). Prior to the filing of the petitioner's complaint the grand jury for the Western District of Pennsylvania on November 3, 1939, returned an indictment against the defendants named in petitioner's complaint charging them with conspiring to defraud the United States in violation of section 37 of the Criminal Code (18 U. S. C., sec. 88) by submitting collusive bids and allocating jobs in connection with certain public works projects (R. 301–329).[2] The defendants subsequently pleaded *nolo contendere* to the indictment and substantial fines were imposed by the district court (R. 295–300). Before the criminal prosecution was concluded the

[2] Other indictments, of which No. 10463 (R. 323–329) was typical, were dismissed at the time the defendants plead *nolo* to the indictment referred to in the text. These indictments charged violations of Section 35 (A) of the Criminal Code (18 U. S. C., Section 80). Whenever reference is made in the remainder of this brief to the indictment against the respondents in No. 173, reference to the indictment to which the defendants plead *nolo*, No. 10462 (R. 301–329), is intended.

complaint in the case at bar was filed, alleging facts substantially identical with those alleged in the indictment.

At the conclusion of the trial in the district court the jury returned a verdict against all but one of the defendants in the sum of $315,100.91 (R. 338). Of the total sum of the judgment $203,100.91 were damages and $112,000 were penalties (R. 338). The district court denied a motion for a new trial and a motion for judgment n. o. v. (R. 346, 387). The circuit court of appeals reversed the decision of the district court, holding that the respondents had not made a claim against the United States within the meaning of R. S. 5438 (R. 471).

The complaint in No. 236 was filed by petitioner Ostrager on February 1, 1940, under R. S. 3490–3493 to recover damages and penalties allegedly due the United States (R. 2–11). Prior to the filing of that complaint the federal grand jury for the Eastern District of Louisiana, New Orleans Division, had returned an indictment against the defendants named in petitioner's complaint, charging them *inter alia* with diverting to their own benefit monies appropriated under the Emergency Relief Appropriations Act of 1935 through collusive bidding on certain public works projects. Pleas of *nolo contendere* were entered by the defendants on January 15, 1940, and fines totaling $5,000 were imposed by the district court. (R.

26–37, 60–81.)[2a] On the same day a complaint and consent decree were filed. Petitioner's complaint was filed on February 1, 1940, based on facts revealed in the indictment.

On December 31, 1940, the district court sustained a demurrer to the petitioner's complaint on the ground that the proceedings in the instant case would subject the defendants to double jeopardy (R. 81). On April 15, 1942, the circuit court of appeals affirmed the decision of the district court, basing its decision upon the opinion of the circuit court of appeals in No. 173 (R. 114).

The remainder of the facts so far as they are relevant to the questions in which the United States is interested will be stated in the argument.

SUMMARY OF ARGUMENT

I

The complaint filed by each of the petitioners is based on facts revealed by an indictment returned by a Federal grand jury after a Government investigation. We believe that the statute under which these actions were brought was intended to authorize a suit by private individuals only when they uncover and prosecute offenses

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[2a] At the same time another count of the same indictment charging a conspiracy in violation of Section 37 of the Criminal Code (18 U. S. C., Section 88) was *nolle prossed*. Whenever reference is made in the remainder of this brief to the indictment in No. 236, reference to the second count alone is intended.

against the United States and was not intended to permit them to base a suit on facts revealed by prior Government action. If the statute is construed to permit private suits by individuals in cases such as the cases at bar, it will impair rather than promote enforcement of the law.

II

R. S. 5438 contains three separate clauses, each with independent meaning and covering a different offense. Respondents' conduct can be deemed violative of all three clauses, but the third clause is particularly apposite.

Clause one: This clause applies, *inter alia,* to "Every person who * * * *causes to be made* * * * any claim upon * * * the United States * * * knowing such claim to be false * * * or fraudulent." (All italics ours.) Respondents' claims against the municipalities were fraudulent, as respondents knew. It is arguable that respondents *caused* the sponsoring municipalities to present a false or fraudulent claim against the United States and that the fraud in respondents' claims against the sponsors inhered in the latter's claims against the United States.

Clause two: This clause applies, *inter alia,* to "Every person * * * who, for the purpose of * * * *aiding to obtain* the payment * * * of such claim [upon the United States], makes,

[or] uses * * * any false * * * certificate, * * * knowing the same to contain any fraudulent or fictitious statement." Respondents concededly submitted false certificates of non-collusive bidding in support of the great majority of their successful bids. These certificates were made or used for the purpose of aiding to obtain the payment of the sponsors' claims against the United States. The clause does not require that the claim itself be fraudulent.

Clause three: This clause covers "Every person * * * who enters into * * * conspiracy to defraud the Government * * *, by obtaining or aiding to obtain the payment * * * of any * * * fraudulent claim * * *." It is not denied that respondents were parties to a "conspiracy to defraud the Government of the United States." Unlike clause two, which by the use of the words "such claim" plainly refers back to the claim against the United States described in the first clause, clause three refers broadly to "any claim." Clause three thus differs fundamentally from the preceding clauses in that it does not require that the claim be upon or against the United States as long as the United States is to be defrauded. Furthermore, the fraud in obtaining the contracts undoubtedly carried over to respondents' claim for payment under them, even though the claims contained no false statement in themselves. The payments were the ultimate objects

of the fraud, and caused the real damage to the Government.

III

So far as we have been able to ascertain, the principle of double jeopardy has never been applied to actions brought by private persons. To permit suits for damages brought by such individuals to bar the enforcement of the criminal law by public officials might entail serious and unfortunate consequences.

A

The indictments to which the respondents pleaded *nolo* were not brought under R. S. 5438 or its successors, but under the general conspiracy act and Section 9 of the Emergency Relief Appropriation Act of 1935. Since the offenses charged under these statutes require proof of different facts from those required under R. S. 5438, they are not identical, and an action under one does not bar a proceeding under the other.

B

It has frequently been held that suits for penalties may be punitive and therefore subject to the rule against twice being put in jeopardy. *Helvering* v. *Mitchell,* 303 U. S. 391, indicates, however, that the question as to whether a remedy is civil or criminal is one of statutory construction,

with the crucial distinction being between remedial and punitive penalties. The intention of Congress was that the penalties imposed by R. S. 3490 be both civil and punitive. In view of the considerations of policy against treating suits by private persons as criminal, and uncertainty as to the application of the above tests and the decisions, we have come to no definite conclusion as to whether these actions should be held to be civil or criminal.

ARGUMENT

I

R. S. 3490–3493 Do Not Authorize Private Individuals to Institute Actions for Penalties and Double Damages Based Upon Facts Revealed as a Result of an Investigation by the Government

The statute under which the petitioners have instituted the actions now before this Court was enacted on March 2, 1863, 12 Stat. 696 (R. S. 3490–3493, 31 U. S. C., secs. 231–234). From the time of the passage of the Act until the date of the filing of the complaints in the cases at bar there is no reported case in which a private individual brought an action under that statute basing his complaint upon facts revealed in an indictment returned by a federal grand jury or on other pleadings filed by the Government. We believe

that R. S. 3490–3493 was not intended to permit the maintenance of actions such as this where the private individual bringing the suit does not uncover the crime but bases his action upon a proceeding brought by the Government.

The action in No. 173 was commenced in the Western District of Pennsylvania on January 25, 1940, by the petitioner Marcus in his own behalf and on behalf of the United States under the provisions of R. S. 3490–3493 to recover penalties and double damages allegedly suffered by the United States. Prior to the institution of this action, on November 3, 1939, an indictment was returned by the federal grand jury in the same district, after an investigation by the United States, against the same defendants named in the petitioner's complaint, charging them with conspiring to defraud the United States in violation of Section 37 of the Criminal Code (18 U. S. C., sec. 88) by submitting collusive bids and allocating contracts in connection with bids on certain public works (R. 301–322).

On January 5, 1940, the defendants were arraigned and twenty-four defendants entered pleas of *nolo contendere*. Trial was set for February 5, 1940, for the remainder of the defendants, all of whom pleaded not guilty to the indictment. On February 6, 1940, the remainder of the defendants named in the indictment entered pleas of *nolo contendere* and fines in the amount of $54,100 were

imposed by the district court on the defendants (R. 294–300).[3]

While the criminal case was still pending the instant case was filed by the petitioner Marcus on January 25, 1940. The averments of the complaint filed by petitioner Marcus (R. 5–32) are substantially identical with the allegations in the indictment (R. 301–322). Indeed, most of the allegations in the complaint were obviously copied verbatim from the indictment.[4] It is plain that the suit is based upon the facts revealed in the indictment.

The complaint in No. 236 was commenced by the petitioner Ostrager in the Eastern District of Louisiana, New Orleans Division; on February 1, 1940. Prior to the filing of that complaint the federal grand jury for the same district, after an investigation by the United States, returned an indictment against the defendants named in petitioner's complaint, charging them *inter alia* with diverting to their own benefit moneys, appropriated under the Emergency Relief Act of 1935, in connection with bids on cer-

[3] The record shows that all of the defendants named in the criminal suit had entered pleas of *nolo contendere* on January 5, 1940 (R. 295–296). An examination of the docket of the district court and of the files of the Department of Justice show that the record is incorrect and that the facts stated in the text are accurate.

[4] Compare paragraphs 7-9, 11–16 of the complaint (R. 9–13) with paragraphs 5–7 and 9 of the indictment (R. 303–309).

tain public works projects (R. 35–37). On January 15, 1940, the defendants named in the criminal case entered pleas of *nolo contendere* and fines totalling $5,000 were imposed by the district court (R. 61–80).

On February 1, 1940, the petitioner Ostrager filed his complaint (R. 2–11) alleging facts substantially identical with the facts set forth in the indictment. In this case also many of the allegations of the complaint were copied from the indictment, and it is apparent that the action is based upon the facts revealed in the indictment.[1]

Throughout the time during which the cases at bar were pending neither the petitioners nor counsel who, acting at the petitioners' behest, signed the complaint, were officials of the United States or authorized by the Attorney General to act on behalf of the United States in this connection. The Attorney General was not informed prior to the filing of the suits that the petitioners were contemplating such actions and he has not consented to the filing of these actions nor has he subsequently ratified their institution or maintenance. At no stage of the proceedings in the court below in either case has the action been under the control or direction of the Attorney General.

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[1] Compare paragraphs 11 and 13 of the complaint (R. 7, 8–9) with paragraphs III (1) and Count II of the indictment (R. 29, 35–37).

Inasmuch as the United States had commenced the investigations on its own initiative and obtained indictments, it is reasonable to believe that it would have taken whatever steps were necessary to protect the public interest. Government counsel assumed, however, that separate suits for damages could not be brought after petitioner commenced these actions. Whether the Government would otherwise have brought suits for double damages and penalties under R. S. 3490–3493 or some other appropriate action for damages would have depended upon what steps the Attorney General decided would most adequately protect the public interest, in the light of the questions raised as to the applicability of R. S. 3490 and the principles of double jeopardy.

The filing of the complaints by the two petitioners here apparently has stimulated a number of other private individuals to utilize the results of Government investigations to their own advantage. Since the date when petitioner Marcus filed his complaint, four other suits have been filed by private individuals under R. S. 3490–3493 based upon facts revealed in indictments returned by federal grand juries or based upon facts alleged in a complaint filed by the United States. (*Mandel* v. *Cooper Corporation*, 42 F. Supp. 317 (S. D. N. Y.); *United States ex rel. Brensilber* v. *Bausch & Lomb Optical Co. et al.*, C. C. A. 2, decided November 5, 1942); *United*

States ex rel. Beckhardt v. *Rockbestos Products Corp.*, Civil Action No. 19–142 (S. D. N. Y.); *United States ex rel. Bayarsky* v. *Brooks et al.*, Civil Action No. 1956 (D. N. J.)).*

The institution of actions by private persons in these circumstances is a matter of grave concern to the United States and the United States looks with disfavor upon such actions. The petitioners and other persons who have filed similar actions, although acting presumably as agents and attorneys for the United States, are in fact not acting under the supervision of the Attorney General or exclusively in the public interest. In each case the private individual is seeking a large financial reward without assisting the Government by uncovering an offense against the United States.

To determine whether such results were intended by Congress the statute must be examined in the light of legislative history, the purpose of the act and the evil it was designed to eliminate. That examination shows, we believe, that Congress intended to permit actions by private individuals only when they were actually assisting the enforcement of the law by uncovering and punishing offenses against the United States. The act was not intended as a means of rewarding or benefit-

* One suit was filed after the fact of a Government investigation was publicly disclosed. *United States ex rel. Houlle* v. *Fruco Construction Co.*, No. 1780 (E. D. Mo.), dismissed without prejudice on June 24, 1942.

ing private individuals who are taking advantage of and not aiding law enforcement by the Government.

The instant statute was enacted in 1863 in the midst of a great national crisis. The enforcement of the Federal laws was practically impossible in many parts of the country. All of the energies of the Government were directed towards the prosecution of the war between the states and innumerable opportunities were available, and availed of, for unscrupulous individuals to defraud the Federal Government. At the time of the passage of the Act, the Attorney General lacked an adequate staff, and it was impossible for him to exercise detailed control or supervision over the conduct of litigation in which the interests of the United States were involved. (See Cummings and McFarland, *Federal Justice*, Ch. 11, p. 218 et seq.) The district attorneys responsible for both criminal and civil litigation brought in the name of the United States undoubtedly did not possess the facilities adequately to investigate and prosecute the many persons involved in fraudulent transactions resulting in injury to the United States (Congressional Globe, 37th Cong., 3d Sess., at p. 952; Hockett, *Political and Social Growth of the American People, 1492–1865*, 759). It was as a result of these facts that the statute was passed.

In those circumstances Congress saw fit to delegate to private persons enforcement of federal law to the extent of allowing them to bring actions in

the name of the United States. The situation which was intended to be reached was that in which the private individual uncovered and then prosecuted an offense against the United States. The purpose of the statute is made clear from statements made by Senator Howard in charge of the bill on the floor of the Senate. During the course of the discussion of the Act Senator Howard said (Cong. Globe, 37th Cong. 3rd Sess., pp. 955–956):

> The other clauses which follow, and which prescribe the mode of proceeding to punish persons who are not in the military service of the United States, I take it, are open to no serious objection. The effect of them is simply to hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. *The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such;* but it is not confined to that class. Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the *qui tam* clause, and to one half of the double damages which may be recovered against the persons committing the act. In short, sir, I have based the fourth, fifth, sixth, and seventh sections upon the old-fashioned idea of holding out a temptation, and "setting a rogue to catch a rogue," which is the safest and

most expeditious way I have ever discovered of bringing rogues to justice.' [Italics supplied.]

It is of significance that since the beginning the act has been known as an "informer" statute. The illustration given in the above quotation as to the manner in which the act was designed to operate was of an informer betraying his colleagues. The emphasis was clearly on the bringing to light of information as to wrongdoing which would not otherwise have been unearthed. The reward for the informer was for the disclosure and not merely for the prosecution of the action.

Certainly Congress did not pass the statute in order to permit private persons who had contributed nothing to the discovery of the crime to step in and share the proceeds as soon as the facts had been made known as a result of the Government's own prior investigation. The object of the statute was not to give a bonanza to the person or attorney who was the most diligent in realizing the possibilities of copying the Government's pleading and taking advantage of the information disclosed by the Government's own inquiry. Indeed,

[7] It seems clear from this statement that Congress intended that the United States Attorney, if he uncovered the crime against the United States, should be authorized to commence an action under R. S. 3490–3493 and receive one-half the penalties and damages. The United States Attorney is no longer permitted to receive any compensation other than his salary for performing his official duties (5 U. S. C. 70–71).

if private suits may be brought in these circumstances, races between private counsel to be the first to put a new caption and conclusion on the Government's indictment are quite within the realm of possibility. In such cases the United States would be informing the "informer" rather than the contrary. To construe the act as allowing actions of this type would be an ironic perversion of the legislative purpose.

When the Government has itself already uncovered the fraud, it should be entitled to any recovery which may be obtained in addition to compensatory damages. As petitioner in No. 173 states in his brief (p. 19), one of the objects of the original 1863 act "was to reimburse the Government for the heavy expense of investigation as well as for the loss directly resulting from the fraud." This objective is not obtained when the Government bears the burden of the investigation and a private person keeps the additional recovery.

If the statute is construed to permit informer suits of the character of the suits now before this Court, the enforcement of the law will not be promoted. It is the duty of the Attorney General to enforce the laws of the United States and to take appropriate legal action to protect the public interest. To carry out that duty he is authorized to institute a wide variety of legal actions. When he authorizes the commencement of an investigation he is merely using one weapon in the legal

arsenal of law enforcement that is available to him. In the light of the facts of a particular case he may subsequently decide that the public interest requires the institution of a criminal and a civil proceeding simultaneously, or a criminal proceeding to be followed by a suit for an injunction or for damages. A more complicated situation may require more elaborate legal proceedings; thus a single suit may be part of a more elaborate framework whose over-all purpose is not accomplished when the first complaint or indictment is filed.

On the other hand, the Attorney General may decide that the public interest requires that an action should be temporarily delayed or postponed. For example, at the present time he may decide that a particular action would injure the war effort and should not be now initiated. Moreover, the filing of a suit in one case may adversely affect another suit. Effective law enforcement dictates that the control of litigation on behalf of the United States be under the direction of the Attorney General who is able to act at all times exclusively in the public interest.

If it is possible for a private individual to commence an action after the Attorney General has instituted proceedings, but before action by the United States is yet complete, then it is no longer possible for the Attorney General to control proceedings brought on behalf of the United States in such a way as to protect the public interest.

Such a private suit may prevent the Government from taking steps which it believes are essential to the protection of the public in connection with the instant suit or in connection with a different suit. Moreover, the likelihood of suits of this nature would impede the expeditious disposition of criminal cases, since defendants who would otherwise plead guilty or *nolo* might well be less willing to do so if further litigation would be encountered. Consequently, we believe that private suits of this nature brought by individuals who are not responsible to the Attorney General are likely to lead to extensive abuses and to situations in which enforcement of the law is hindered and not promoted.

We have already referred to the likelihood of an unseemly race by outsiders for the opportunity of profiting from the disclosures revealed by the Government's own investigation. Success in such a test of speed and foresight would not necessarily go to the counsel best prepared to protect the Government's interests. Moreover, commencement of a suit by a private person as relator for the United States would probably prevent the Government from bringing its own action for damages and recovery by the public treasury of all the damages allowed.

Accordingly, we believe that this Court should construe the statute as not permitting an action to be brought by a private individual after the United States has instituted proceedings with respect to

the same transactions. This interpretation is in accord with the principle that a statute should be construed to give effect to the intent of Congress, determined by an examination of the end sought to be achieved, the subject matter of the statute and its legislative history (*Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 464–465; *United States* v. *Katz*, 271 U. S. 354, 357; *Ozawa* v. *United States*, 260 U. S. 178, 194; *United States* v. *Cooper Corp.*, 312 U. S. 600, 605; *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 258; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 273), and in the light of the evils which the statute sought to correct (*Warner* v. *Goltra*, 293 U. S. 155, 158; *Denn* v. *Reid*, 10 Pet. 524, 527).* The applicable principle was stated by this Court in *Ozawa* v. *United States*, 260 U. S. 178, 194:

> It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its de-

* It is significant in this connection that these cases now at bar are the first reported cases throughout the 79 years during which the statute was effective in which a private individual brought an action based on a previous Government proceedings. (Cf. *United States* v. *Cooper Corp.*, 312 U. S. 600, 613–614.)

> sign and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. See *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Heydenfeldt* v. *Daney Gold Mining Co.*, 93 U. S. 634, 638. * * *

Moreover, it has been said that informer statutes are disfavored and that they should be strictly construed. As Mr. Justice Brewer, when a circuit judge, declared with reference to a similar statute, in *Taft* v. *Stephens Lith. & Eng. Co.*, 38 Fed. 28 (E. D. Mo.), at p. 29:

> Plaintiff is not suing for the value of his services, or for injury to his property, but simply to make profit to himself out of the wrongs of others; and when a man comes in as an informer, and in that attitude alone asks to have a half million dollars put into his pocket, the courts will never strain a point to make his labors light, or his recovery easy.

Both lower courts in these cases gave effect to this principle. (See also *Ferrett* v. *Atwill*, 8 Fed. Cas. 4747; *United States* v. *Kansas Pac. Ry. Co.*, 26 Fed. Cas. 15,506; *United States ex rel. Bronsilber* v. *Bausch & Lomb Optical Co. et al.*, decided November 5, 1942 (C. C. A. 2); and authorities cited by the court below in No. 173 (R. 474–475).)

We believe that it was error for the courts below to have applied this principle of strict construction to the statutory provisions defining the sub-

stantive offense, inasmuch as the construction of that language affects suits by the United States as well as those brought by informers. The policy of the rule would, of course, not apply to actions by the Government, although the statutory language is the same. For the reasons set forth *infra*, pp. 24 *et seq.*, we believe the construction of these provisions by the circuit courts of appeals to have been erroneous.

But there is good reason for giving a narrow interpretation to the informer's act as applied to the right of private individuals to sue, particularly when this will make the Act conform to the obvious purpose of Congress and obviate consequences which Congress never intended. The policy in favor of a strict construction of informers' statutes is reinforced by the principle referred to above that a statute should be construed so as to achieve the purpose of Congress determined in the light of contemporary circumstances, and to avoid unreasonable consequences not contemplated by the legislature.

II

Respondents' Conduct Violated R. S. 5438 as Incorporated in R. S. 3490

Sections 3490–3493 of the Revised Statutes (31 U. S. C., secs. 231–234) provide that persons committing any of the acts prohibited by R. S. 5438 shall be liable to the United States for double dam-

ages plus $2,000 forfeiture. Such amount may be recovered either by the United States directly (Sec. 3492) or by any other person (Sec. 3491), suing for himself as well as for the United States. The decisions of the courts below holding Section 5438 inapplicable would also bar the Government from bringing its own suit for damages and forfeiture under Section 3492.*

Three separate clauses of Section 5438 have been invoked by petitioners to support their position. The first clause applies to persons who make or *cause to be made* a claim against the United States with knowledge that it is false or fraudulent. The second applies to persons who "for the purpose of obtaining or *aiding to obtain* the payment or approval of *such* claim," knowingly make or use or *"cause to be made or used"* any false document. The third clause applies to persons who enter into any agreement or conspiracy to defraud the United States "by obtaining or aiding to obtain

* The Government would not be precluded from instituting criminal proceedings under either the amended version of Sec. 5438 (18 U. S. C., secs. 80, 83) (*cf. United States* v. *Gilliland*, 312 U. S. 86; *United States* v. *J. Greenbaum & Sons, Inc.*, 123 F. (2d) 770 (C. C. A. 2); *United States* v. *Mellon*, 96 F. (2d) 462 (C. C. A. 2), certiorari denied, 304 U. S. 586), or other statutes such as those invoked in the cases at bar (18 U. S. C., sec. 88; Sec. 9 of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115, 118). However, since R. S. 3490 has not been amended to refer to the amended criminal provisions, civil liability must be determined by reference to the text of R. S. 5438 at the time of its incorporation by reference.

the payment * * * of *any* false or fraudulent claim." (All italics ours.) Both of the circuit courts of appeals in these cases directed their attention exclusively to the first of these clauses and held it inapplicable. They ignored the other two clauses, and their reasoning does not apply to some of the language in those clauses.

The circuit courts of appeals held that Section 5438 applied only to claims against the United States, and that the false claims made by respondents were against the municipalities. But the courts apparently did not take note of the provisions in the first two clauses with respect to persons who (1) *cause* a false claim to be made against the United States, or (2) cause to be used any false document for the purpose of *aiding* to obtain the approval of such claim. The courts also apparently overlooked the fact that the third clause is not limited to claims against the United States, but applies to persons who conspire to defraud the United States by aiding to obtain the payment of *any* (not "such") false or fraudulent claim.

It is true that in other cases, in addition to the decisions below, the courts have treated the statute as strictly limited to claims against the United States (*United States ex rel. Kessler* v. *Mercur Corporation*, 137 F. Supp. 742 (S. D. N. Y.), affirmed, 83 F. (2d) 178 (C. C. A. 2), certiorari denied, 299 U. S. 576; *United States ex rel. Salzman* v. *Salant & Salant*, 41 F. Supp. 196 (S. D. N. Y.),

Cf. United States v. *Cohn*, 270 U. S. 339.) But it does not appear that any of the previous cases were concerned with the present situation, or that the courts' attention was called to the importance of the words we have emphasized. In none of the cases was the significant difference between the third clause and the first and second noted.

We think that the facts at bar can fairly be said to fall within all three clauses, and that the third clause, in particular, seems to cover them. We see no reason why the words of the statute should not be given their literal meaning when this will permit the law to reach types of fraud which cause the Government serious injury.[10] Certainly no public policy favors an interpretation of the law in order to protect persons who engage in such conduct. With these considerations in view, we will take up each clause in turn.

It will be helpful to the Court, however, if we first briefly summarize the factual situation involved, as set forth in the more complete record in No. 173. (Unless otherwise indicated, subsequent record references in this brief are to the record in No. 173.)

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[10] See *United States* v. *Bowman*, 260 U. S. 94, 102, in which the Court said with respect to Section 35 of the Criminal Code, the successor to R. S. 5438:

"* * *. As said in *United States* v. *Lacher*, 134 U. S. 624, 629, quoting with approval from Sedgwick, Statutory and Constitutional Law, 2d ed., 282: 'penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment.' They are not to be strained either way."

As required by its regulations (44 C. F. R. 216.2–216.3), P. W. A. participation in financing the projects was initiated by a written application from the local governmental agency (the "sponsor" or "owner") for a grant (R. 82, 537), accompanied by a detailed estimate of the cost of the project, broken down according to type of work (R. 498). After checking the estimates, P. W. A. made a formal offer to the sponsor, which generally was to pay 45% of the actual cost, but not to exceed a sum representing 45% of the estimated cost as approved by it (R. 498–500, 520). This offer incorporated by reference (R. 179–180, 497–498) the standard terms and conditions prescribed in P. W. A. Form 230 (157–179), which required, among other things, that "all work on the project * * * be done by contract," that "the applicant give every opportunity for free, open and competitive bidding for each and every construction, material and equipment contract" and that "The Applicant will give such publicity to advertisements or calls for bids by it * * * for the furnishing to it of work, labor, materials, and equipment as will provide adequate competition and the award of each contract therefor will be made to the lowest responsible bidder as soon as practicable" (R. 167). The acceptance of the offer created the contract between the sponsor and P. W. A. (R. 116–117, 180, 181–184, 497–498, 500–501).

The sponsors then advertised for bids on the work required by the projects, the advertisements

showing on their faces that P. W. A. projects were involved (R. 43–44, 87, 217–218, 495–496). Respondents, acting pursuant to their collusive arrangement, were among the successful bidders (R. 11–14, 225–226, 274–276). At the request of the sponsors, the respondents generally submitted to the sponsors certificates to the effect that their bids were "genuine and not sham or collusive" (R. 226, 49, 14), which apparently were retained in the sponsor's files (R. 51–52). The terms upon which the federal grants were made required the sponsors to submit to P. W. A., for its approval, proposed contract documents before they advertised for bids and the executed contract documents before the commencement of work on the projects (R. 502, 179, 157, 165, 275).

In accordance with the P. W. A. regulations (44 C. F. R. 237.8), the respondents submitted their claims for payment, as their work progressed, on P. W. A. Form I-23, entitled "Periodical Estimate for Partial Payment" (R. 118–119, 202–207), which, of course, indicated that the project was financed by P. W. A. Before payment was made to respondents by the sponsors, these estimates were subject to the approval of the local P. W. A. representative (R. 40–41, 118–119, 207, 493–494, 499, 502, 503, 504–505).

As required under the agreement between the sponsors and P. W. A., payments for work on the projects were made by the sponsors from a sepa-

rate "Construction Account"(s), in which both the federal grant funds and the funds supplied by the sponsors were kept, and from which accounts all payments for the construction of the projects were made (R. 163, 64, 71–72, 89, 97, 107). The construction accounts were kept in the names of the sponsors and payments from them were made by the sponsors, by the signatures of the sponsors' officials (R. 57–58, 60–68, 104). As specified in the P. W. A. regulations (44 C. F. R. 230.21–230.25) and the agreement between the sponsors and the P. W. A. (R. 157, 160–163), the federal grant funds were advanced periodically, after detailed audits of the status of the projects by P. W. A. representatives (R. 53, 507). During the progress of the work, the projects were under steady surveillance by P. W. A. representatives (R. 69, 79, 80, 86, 95, 503, 529–530).

The jury's verdict established that the effect of respondents' collusive bidding was substantially to increase the amount expended by the United States on the projects in question (R. 142, 338, 389).

1. THE FIRST CLAUSE OF R. S. 5438

This clause covers:

> Every person who makes or *causes* to be made, or presents or *causes* to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United

> States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent * * * [Italics supplied.]

In our view the possibility of applying clause one to the facts at bar rests chiefly upon the coverage of persons *causing* the presentment of the proscribed claims. Unquestionably, respondents *caused* the municipalities to present to the United States claims to cover the payments made by the municipalities to respondents. The real issue is whether the claims which the sponsoring municipalities indubitably made "upon or against the Government of the United States" can be said to be "fraudulent", even though the sponsors themselves were innocent, because, as shown *infra*, pp. 40–44, respondents' claims upon the sponsors were fraudulent.

We think there is no substantial question concerning respondent's guilty knowledge. They cannot disclaim knowledge of their own actions which occasioned the fraud, if any, in the sponsors claims, and so can scarcely deny acquaintance with the true nature of the sponsors' claims against the United States. Nor can they claim ignorance of the fact that the sponsors were obtaining financial assistance from the United States to pay for the projects. P. W. A. Form I–23, on which respondents submitted their claims (R. 118–119, 202–207), expressly declared that the United States was aiding in the financing of the project involved and specifically called attention to the penalties for presenting false claims to the United States (R.

204). The contract documents, including the advertisements for bids and the bids themselves were replete with references to the fact that P. W. A. projects were involved (R. 217, 223, 225, 231, 232, 236, 495–496). Indeed, it is difficult to see how respondents can disavow knowledge of the relationship between the sponsors and the United States in view of their previous pleas of *nolo contendere* to an indictment charging conspiracy to defraud the United States in connection with their collusive bids on the same projects involved here (R. 301, 307; No. 236, R. 60–81).

It is at least arguable, if not clear, that the fraud in respondents' claims against the sponsors inhered in the sponsors' claims against the United States.[11]

[11] P. W. A. form 230 (R. 157–179), specifying terms and conditions to which the Government's offer to the sponsor was expressly subject (R. 179), required that the sponsor "give every opportunity for free, open, and competitive bidding" (R. 167). The record shows several instances where P. W. A. authorities, upon suspecting collusion in the bidding, withheld the payment of claims made by the sponsors (R. 46–48, 195–196).

The argument for holding respondents liable for causing the sponsors to submit fraudulent claims upon the government would be stronger if the certificates of non-collusion had actually been presented to the P. W. A. authorities. However, although the obligation of the United States to make the grants was expressly contingent upon the submission to the P. W. A. of proposed contract documents prior to the sponsors' advertisement for bids and of executed contract documents before the work commenced (R. 179, 157, 165), which documents included the bid proposals (R. 275), it appears that the certificates of non-collusion were not required by, or submitted to, P. W. A., but were obtained by the sponsors and retained in their files (R. 49, 51–52).

The sole purpose of the sponsors' claims was to enable them to obtain the means to meet their obligations to the parties, including respondents, with whom they had contracted for work on the projects. Certainly respondents' fraud tended to swell the amount of the P. W. A. grants, which were computed on a cost percentage basis. The good faith of the municipality should not shield respondents. An innocent agent may be a conduit of another's crime or fraud. Cf. *United States* v. *Gooding,* 12 Wheat. 460, 469; *Belvin* v. *United States,* 260 Fed. 455 (C. C. A. 4); *United States v. Carlin,* 259 Fed. 904 (E. D. Pa.); see *United States* v. *Cohn,* 270 U. S. 339, 344.[12]

2. THE SECOND CLAUSE OF R. S. 5438

The second clause of R. S. 5438 covers:

> Every person * * * who, for the purpose of obtaining or *aiding* to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing

[12] Petitioners' argument for liability under clause one in reliance solely upon respondents' own claims, citing *Madden* v. *United States*, 80 F. (2d) 672, 676 (C. C. A. 1), *Langer* v. *United States*, 76 F. (2d) 817, 823 (C. C. A. 8), and *United States* v. *Harding*, 81 F. (2d) 563, 568 (App. D. C.), at the least requires the interpretation of "claims upon or against the Government of the United States" to apply to claims upon or against *funds* of the United States. This would

> the same to contain any fraudulent or fictitious statement or entry, * * *. [Italics supplied.]

Clause two brings squarely into focus the certificates or affidavits of non-collusive bidding concededly submitted in support of the great majority of the successful bids involved here and by almost all of the respondents (R. 49, 225–226, 325). These were admittedly false. And the text of the statute is plain that the offense defined in clause two is complete if the false document is made or used for the prescribed purpose of obtaining or aiding to obtain the payment or approval of a claim against the United States, without proof of the

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hardly be consonant with the language in *United States* v. *Cohn*, 270 U. S. 339, where it said (270 U. S., at 345–346):

"* * * it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a "claim upon or against" the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant. * * *"

If this is the proper definition of "a claim upon or against * * * the United States" within the meaning of the statute, respondents' own claims hardly fit within that category. Their contracts being concededly solely with the sponsors (R. 274), they could not have sued the Government. *Cf. United States* v. *Sherwood*, 312 U. S. 584, 589. Nor did the Government's exercise of control over the disbursement of its grant funds under respondents' contracts with the sponsors involve the assumption of any liability on its part. *Cf. United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421–423.

bona fides of the claim[13] and whether or not the claim is ever actually presented for payment or approval.

Hence the sole question concerning the application of the second clause is a factual one: namely, whether respondents made or used the certificates for the purpose of aiding to obtain the payment of the sponsor's claims against the United States, as well as to facilitate payment of their own claims against the sponsors. On this question we think that the circumstances noted above, pp. 31–33, amply sustain the conclusion that the certificates were made or used for the prohibited purpose. With the knowledge that P. W. A. projects were involved, it was clearly to the interest of respondents to facilitate the consummation of the federal aid which furnished part of the funds from which they were paid. The statute does not require that the prohibited purpose should have been the exclusive purpose of the respondents (*cf. Belvin* v. *United States*, 260 Fed. 455, 456–457 (C. C. A. 4); *United States* v. *Anderson*, 101 F. (2d) 325, 330–331, 333 (C. C. A. 7), certiorari denied, 307 U. S. 625), or that the false writing should have

[13] The lower courts are divided as to whether clause two requires a showing that the claim itself, as distinguished from the false supporting document, is fraudulent. Compare *United States* v. *Jones*, 32 Fed. 482, 483 (D. S. C.) with *United States* v. *Miskell*, 15 Fed. 369, 370 (C. C. Ky.), and *United States* v. *Jennison*, 26 Fed. Cas. No. 15,475 at 609 (C. C. Kan.). If, however, such a showing is required, it can be made out on the analysis set out, *supra*, at pp. 31–32.

actually been brought to the attention of the United States or have actually induced reliance (*cf. Kay* v. *United States*, 303 U. S. 1, 5–6). Indeed, as we have noted, clause two does not even require presentment, much less payment or approval, of the claim itself.

3. THE THIRD CLAUSE OF R. S. 5438

The third clause of R. S. 5438 covers:

> Every person * * * who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * *.

There is no question here as to whether the respondents were parties to "any agreement, combination, or conspiracy to defraud the Government of the United States." Aside from respondents' previous pleas of *nolo contendere* to an indictment charging conspiracy to defraud the United States, the verdict of the jury in the trial in the district court in the *Hess* case, particularly when viewed in the light of the court's charge (R. 133–134, 138–139, 142) likewise constitutes a clear finding that respondents conspired to defraud the United States.

Nor is there any question as to whether respondents' fraud upon the United States was to be, and was in fact, accomplished by obtaining the pay-

ment or allowance of claims. The I–23 forms on which respondents submitted their demands for payment (R. 118–119, 202–205) were claims in the strictest sense of the word (*cf. United States* v. *Cohn*, 270 U. S. 339, 345–346). Neither is there any question of guilty knowledge involved here. The respondents were fully aware of the nature of the claims they presented.

The real questions under the third clause are (a) whether the reference to "claim" in that provision means the "claim upon or against the Government of the United States" described in the first clause of R. S. 5438, and (b) whether respondents' claims were "fraudulent."

(a) *Whether the reference to claim in clause three of R. S. 5438 means "a claim upon or against the Government of the United States"*

The third clause of R. S. 5438 differs fundamentally from the first two clauses in that there is no requirement that the claim be upon or against the United States. Clause three, unlike clause two, which by the use of the words "such claim" plainly refers back to the claim against the United States described in clause one, refers broadly to *any* claim. The difference in phraseology cannot be assumed to have been unintentional. The third clause, with its general reference to any conspiracy to defraud the United States, is undoubtedly more sweeping in scope than the preceding provi-

sions. The original sponsor of the statute characterized the offence defined by this clause, in contrast to his more limited description of the offenses covered by the first two clauses, as "conspiring to cheat the United States" (Cong. Globe, 37th Cong., 3d Sess., part II, pp. 952–953), an explanation wholly consistent with the breadth of the language actually used and implying no intention to limit its application solely to claims "upon or against the Government of the United States". A contrary construction of R. S. 5438 would fail to reach sub-contractors who conspired to defraud the United States by fraudulently inflating their claims against contractors working under cost-plus Government contracts. Similar language in the general conspiracy statute (Criminal Code, Sec. 37, 18 U. S. C., sec. 88) has been interpreted broadly enough to cover the facts of this case (*Belvin* v. *United States*, 260 Fed. 455 (C. C. A. 4) (conspiracy to defraud United States by padding wage claims made to cost-plus contractor); *United States* v. *Carlin*, 259 Fed. 904 (E. D. Pa.); *cf. United States* v. *Walter*, 263 U. S. 15, 18).

That the courts will heed such evidence of legislative intention as the distinction between the reference to "such" claims in the second clause and to "any" claims in the succeeding clause appears from the interpretation given a statute which furnishes a remarkably close parallel to R. S. 5438. Section 29 of the Criminal Code (3 Stat. 771, 18

U. S. C., sec. 73) also has three clauses.[14] The first makes it unlawful to forge or counterfeit any writing, the second to utter or publish as true any *such* forged or counterfeited writing, and the third to present to any officer of the United States *any* writing with intent to defraud. The language used by the courts in rejecting the argument that the third and second clauses cover the same documents can be applied almost without change to the third clause of R. S. 5438. In *United States, ex rel. Starr* v. *Mulligan*, 59 F. (2d) 200 (C. C. A. 2), the court, in passing upon the Government's contention that the second clause covered the petitioner's case, declared (59 F. (2d) at 201):

> * * * To do this necessitates disregarding the word "such", inserted in the second and omitted in the third clause. The pres-

[14] This section reads as follows:

"(1) Whoever shall falsely make, alter, forge, or counterfeit * * * any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving * * * from the United States, or any of their officers or agents, any sum of money; or

"(2) whoever shall utter or publish as true * * * *any such* false, forged, altered, or counterfeited deed, power of attorney, order, certificate, receipt, contract, or other writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

"(3) whoever shall transmit to, or present at * * * any office or officer of the Government of the United States, *any* deed, power of attorney, order, certificate, receipt, contract, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, shall be fined * * * and * * * imprisoned * * *." [Italics and numbers supplied.]

> ence of "such" limits the scope of the second clause to such writings as are described in clause 1, and results in a consistent interpretation of the whole section. * * *

With respect to the same provision this Court declared in *Davis* v. *United States*, 231 U. S. 183, 188–189:

> * * * The context of the section reinforces this view, since the contrast between the narrow scope of the first two paragraphs and the enlarged grasp of the third shows the legislative intent, after fully providing in the first two paragraphs for forged and counterfeited documents, instruments, etc., to reach by the provisions of the third paragraph, any and all fraudulent documents, whether forged or not forged, and thus efficiently to deter from committing the wrong which it was the purpose of the section to prohibit. * * *

See to the same effect *United States* v. *Staats*, 8 How. 40, 46–47; *United States* v. *Barney*, 24 Fed. Cas. No. 14,524, at 1012–1013 (C. C. S. D. N. Y.).

In none of the cases relied on by respondents in the court below in No. 173 was there any discussion of the scope of the claims covered by the third clause of R. S. 5438, or any comparison of the language of that clause with that contained in the preceding clauses. We believe the third clause should be construed to mean exactly what it says. See pp. 26–27, *supra*.

(b) *Whether respondents' claims were "fraudulent"*

Although the claim described in the third clause need not be against the United States, it must be false or fraudulent. The collusion practiced by respondents in rigging their bids constituted fraud, making the contracts thereby obtained and the claims made pursuant to the contracts fraudulent. This Court has so held. In *McMullen* v. *Hoffman*, 174 U. S. 639, a suit for an accounting under a partnership agreement between two persons who had entered into a collusive bidding arrangement like those presented here, this Court denied relief, holding (pp. 652–653):

> But in this case there is more even than concealment. There is the active fraud in the putting in of these, in substance, fictitious bids, in their different names, but in truth forming no competitive bids * * *. It is not too much to say that the most perfect good faith is called for on the part of bidders at these public lettings, so far as concerns their position relating to the bids put in by them or in their interest. The making of fictitious bids under the circumstances detailed herein is in its essence an illegal and most improper act; indeed, it is a plain fraud, perpetrated in the effort to obtain the desired result.

See to the same effect *In re Salmon*, 145 Fed. 649, 652–653 (W. D. Mo.).

The contracts obtained by respondents here—the very object of the conspiracy—cannot con-

ceivably be separated from the fraud by which they were procured.

Respondents' attempt to isolate the claims made under the contracts from their fraud in obtaining the contracts cannot be supported. The contention apparently is that although they obtained the contracts by fraud, the claims for payment subsequently presented contained no false statements, and were therefore neither false nor fraudulent. We think it clear, however, that the fraud in obtaining the contracts carried over to respondents' claims for payment under them. The payments were the ultimate objects of the fraud, and it would be absurd to hold that because the claims for payment were separately presented, they were not tainted with the fraud. As a practical matter, the real damage to the Government lies in the payment of claims made under the contracts, rather than in the contracts themselves; if the claims were never presented, there would be no financial loss.

If authority be needed for such an elementary proposition, it can be found in *Crocker* v. *United States*, 240 U. S. 74, which held that an undercover arrangement by which a government official shared in the profits under a contract with the Government justified a refusal to pay the claim under the contract. There, as here, the claim itself contained no express misrepresentations, but the Court said (p. 81):

> Of course, the secret arrangement with Machen operated to vitiate the company's contract and justified the Postmaster General in rescinding it on discovering the fraud. * * *
>
> It results that no recovery could be had upon the contract with the Postmaster General, because it was tainted with fraud and rescinded by him on that ground. * * *

As this Court said in the *McMullen* case with reference to the agreement involved (174 U. S., at 653):

> * * * [The] agreement covered and was clearly intended to cover their whole action from the time they agreed to put in their bids in a common interest up to and including the execution and performance of the contract obtained from the city. * * * No division of that contract into two periods, the one prior and the other subsequent to the written agreement between the parties, can be made. * * *

See to the same effect *United States* v. *Coggin*, 3 Fed. 492 (C. C. E. D. Wis.); *Dimmick* v. *United States*, 116 Fed. 825 (C. C. A. 9); cf. *Pan American Co.* v. *United States*, 273 U. S. 456, 500 *et seq.*; *Causey* v. *United States*, 240 U. S. 399, 402.

Apparently opposed to our view that the respondents' claims were fraudulent is *Mandel* v. *Cooper Corporation*, 42 F. Supp. 317 (S. D. N. Y.). There the court, although seemingly conceding that

the contracts were obtained by "fraudulent misrepresentations," held that claims submitted pursuant to contracts obtained from the United States by collusive bids, "identical to the penny," were not fraudulent "within the meaning of the informer statute." The opinion reasoned that the claims were not "false" or "fictitious" and hence were not "fraudulent."

It is difficult to reconcile the *Mandel* case with *Crocker* v. *United States,* 240 U. S. 74, 81. We believe that the stringent interpretation of the statute in the *Mandel* case, involving the complete emasculation of the word "fraudulent," is doubtless a reflection of the disfavor with which the courts view informers. This recently found sharp expression in *United States ex rel. Brensilber* v. *Bausch & Lomb Optical Co. et al.* (C. C. A. 2, decided November 5, 1942), where the court, affirming summary judgment for the defendants in an informer's action, said with reference to R. S. 5438:

> Furthermore so far as it perpetuates the odious and happily nearly obsolete *qui tam* action, it should be regarded with particular jealousy.[15]

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[15] The Court below in No. 173 emphasized that its decision was not a bar to other proceedings by which restitution might be secured (R. 479). However, the availability of a common law remedy is no bar to the institution of proceedings under R. S. 3490–3494. Cf. *Pooler* v. *United States,* 127 Fed. 519, 521 (C. C. A. 1).

The opinion in the *Brensilber* case itself raises some doubts as to the validity of the *Mandel* case, even in its own jurisdiction. In Brensilber's case, the defendant by contracts with other producers had apparently secured a monopoly, so that the bids it submitted to the government for the sale of its products, which ripened into contracts, were not in a real sense competitive. The court recognized a distinction between the case before it and a collusive bidding situation, using No. 173 as a contrasting example of facts which might violate the statute in this respect.[15a]

Since respondents' claims were clearly fraudulent, were concededly intended to defraud the United States, and are thus covered by clause three of R. S. 5438, whether or not they were technically "upon or against the Government of the United States", we are of the opinion that respondents violated the statute.

[15a] We believe that the decision of the Circuit Court of Appeals in the *Brensilber* case, *supra*, is correct so far as relied upon in the text. However, we think the court erred in limiting the scope of the fraud condemned by 31 U. S. C. 231 to the "accepted sense of deceit." We believe that fraud as used in this statute covers a broader ground than the ancient crime of false pretenses. See *Bradford* v. *United States*, 129 F. (2d) 274 (C. C. A. 5), certiorari denied November 23, 1942, No. 455, this Term; *Pandolfo* v. *United States*, 128 F. (2d) 917 (C. C. A. 10), certiorari denied, October 12, 1942, No. 223, this Term; *United States* v. *Groves*, 122 F. (2d) 87, 90 (C. C. A. 2), certiorari denied, 314 U. S. 670; *Leche* v. *United States*, 118 F. (2d) 246 (C. C. A. 5), certiorari denied, 314 U. S. 617; *Shushan* v. *United States*, 117 F. (2d) 110, 115 (C. C. A. 5), certiorari denied, 313 U. S. 574.

III

The Question of Double Jeopardy

Respondents in these cases have contended that their convictions in the criminal proceedings previously brought by the United States barred the instant suits. This contention that the suit for penalties placed the respondents in jeopardy a second time for the same offense, in violation of the Fifth Amendment, was accepted by the district court in No. 236 (R. 85–89) but rejected by the district court in No. 173 (R. 360). The circuit courts of appeals did not pass upon the question, although the Fifth Circuit intimated in No. 236 that it probably would agree with the decision below on the point (R. 116–117).

The issue presented is difficult and novel. So far as we have been able to ascertain, these are the first cases since the original statute was passed in 1863 in which the same person has been both prosecuted criminally and then sued under R. S. 3490. The Government itself has not, to our knowledge, brought both types of proceedings against the same person. Although there is no decision on the point, there is a dictum, in a suit arising under Section 3490, but involving a different question, that "where provision is made by statute for the punishment of an offense by fine or imprisonment, and also for the recovery of a penalty for the same offense by civil suit, a trial and judgment of conviction in the criminal pro-

ceeding is a bar to the civil suit and a trial and judgment for the plaintiff or defendant in the civil suit is a bar to the criminal proceedings" (*United States* v. *Shapleigh,* 54 Fed. 126, 134 (C. C. A. 8)).

The *Shapleigh case* was brought by the Government itself. The present suits were brought by private individuals, in the name of the Government and partially on the Government's behalf. We have been able to find no cases in which the principle of double jeopardy has been applied to actions by private persons. From the standpoint of the defendants, however, in cases brought under R. S. 3490 it seems immaterial whether the suit is brought by the Government or by another on the Government's behalf, and if Section 3490 is regarded as a criminal or primarily punitive statute, it would be difficult to differentiate between suits brought by the United States and suits by private persons.

The unusual character of the suggestion that a suit by a private person should be treated as in the same class for purposes of jeopardy as one brought by the Government makes it desirable to consider the consequences of such a ruling. If, as in these cases, the Government brought its criminal proceeding first, a claim that a civil action for penalties and double damages could not then be brought would not be likely to interfere with the public in-

terest in effective law enforcement.[16] But the principle of double jeopardy works both ways. If the suit for penalties is regarded as sufficiently punitive to be barred by prior criminal proceeding, a criminal prosecution would be barred if the penalty suit were brought first. We think that to permit a suit brought by a private person to bar the enforcement of the criminal law by public officials might entail serious and unfortunate consequences.

If the two types of action should be mutually exclusive, the officials of the Government whose duty it is to enforce the law so as most effectively to protect the public interest would ordinarily decide which procedure should be followed. Often the criminal punishment, with the threat of imprisonment, would provide a more effective sanction and be a greater deterrent to future crime, even though the financial return to the Government might be less. A private individual would not likely be affected by such considerations. He would be able to secure one-half of the proceeds only if the penalty suit were brought—and only if it were brought first, and by him. The result would be that private individuals, acting solely in their own pecuniary interest, would be able to block the bringing of criminal proceedings.

Another danger should be mentioned. If it is held that a private penalty suit under Section 3490

[16] Even if R. S. 3490 were unavailable to it, the Government could always bring an ordinary civil action to recover the damages which it had suffered.

barred a criminal prosecution, astute persons, guilty of defrauding the Government, might induce friendly interests to bring a penalty suit against them. Although the Government could prevent such an action from being discontinued without its consent (Section 3491), it could not control the litigation or force the plaintiff to prepare or present the case in the most effective manner or so as to insure the recovery of a judgment in his behalf. Once the case had gone before the jury, the Government would be barred from further action against the defendant. It is true that so long as a person's fraud remained undiscovered, he would probably not provoke an action against himself under Section 3490. But it is not at all beyond the realm of possibility that such an action might be instituted once a prospective defendant became aware that the Government was investigating his activities.[17]

If we assume that the offense of double jeopardy may be available in a suit not brought by the Government, two further questions are presented: (1) whether an action under Section 3490 is essentially civil or criminal; (2) if it is essentially criminal, whether the complaints in the instant cases charged the same offenses as the indictments under which respondents were convicted.

The first of these questions presents difficult considerations on which the authorities are not, in our

[17] Presumably such conduct would not avail him if discovered, but collusion would present difficulties of proof.

view, entirely clear. We believe, however, that the complaints in these cases do not charge the same offenses as the indictments, the latter having been based upon the general Conspiracy Act (in No. 173) and the Emergency Relief Appropriation Act of 1935 (in No. 236), rather than on R. S. 5438, or its lineal successors. Since it will be unnecessary to determine whether an action under R. S. 3490 is criminal or civil if the offenses charged are not the same, we will take up the question of identity of offenses first.

A. THE QUESTION OF IDENTITY OF OFFENSES

Whether an action under R. S. 3490 is essentially criminal need not be determined unless the offenses charged in petitioners' complaints are the same as those covered by the Government's indictments. Even in the case of two criminal proceedings there is no double jeopardy unless the offenses charged are the same (*Blockburger* v. *United States*, 284 U. S. 299, 304; *Gavieres* v. *United States*, 220 U. S. 338, 342–343).

The question of identity of offenses arises in these cases because the Government's indictments which first placed respondents in jeopardy were not founded on R. S. 5438 or its successors (18 U. S. C., secs. 80 and 83) but upon the general conspiracy statute, Section 37 of the Criminal Code (18 U. S. C., sec. 88), and Section 9 of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115, 118).

The test as to whether two indictments for the same act but based on different statutes charge the same offense is "whether each provision requires proof of a fact which the other does not" (*ibid.*). In those cases this Court approved the statement of the highest court of Massachusetts in *Morey* v. *Commonwealth*, 108 Mass. 433, 434, that:

> A single act may be an offence against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Application of this rule to No. 236 reveals that Section 9 of the 1935 Relief Appropriation Act and R. S. 5438 create entirely separate offenses. The former statute and the indictment returned under it (No. 236, R. 35–37) [18] are concerned with the diversion of funds appropriated under the 1935 Relief Act for the benefit of persons not entitled thereto. R. S. 5438 on the other hand forbids the making of false claims, the use of a false document for the purpose of obtaining payment of a claim, and conspiracy to defraud by obtaining the payment of any claim. Argument is unnecessary to show that each of these statutes "requires proof of a fact which the other does not". Accordingly, though both the indictment and the complaint may

[18] Count 2 contains this charge. Count 1, which was based on the general conspiracy statute, 18 U. S. C., sec. 88, was nolle prossed (R. 59–60) and is not involved here.

be based upon the same transactions, respondents in No. 236 have not been twice put in jeopardy for the same offense.

The complaint in No. 173 is in substantially the same form as in No. 236. The indictment upon which the defendants were convicted, however, charged a violation of the Conspiracy Act, Section 37 of the Criminal Code, 18 U. S. C., sec. 88. This section provides that two or more persons shall be punished if they "conspire * * * to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy".

This statute clearly describes an entirely different offense from that defined in the first and second clauses of R. S. 5438. The offenses defined in those clauses require a claim, not a conspiracy, whereas section 88 is violated by a conspiracy and not by a claim.

A different problem is presented by the third clause of R. S. 5438, which prohibits entering into a conspiracy to defraud the United States "by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim." The quoted language defines the object of the conspiracy. Since this particular object would have to be proved under this section and not under Section 37 the two offenses are not identical. On the other hand Section 37 requires an overt act, whereas this portion of R. S. 5438 does not. Ac-

cordingly, here too it can be said that each statute requires proof of a fact which the other does not.[19]

For these reasons we are of the opinion that the complaints in these two cases do not charge the same offenses as did the indictments and for that reason alone the respondents have not been twice put in jeopardy for the same offense.

B. IS A SUIT UNDER SECTION 3490 ESSENTIALLY CIVIL OR CRIMINAL?

If the Court should conclude that the complaints charged the same offenses as the preceding

[19] Respondents argue that the indictments which were *nolle prossed* charged the same offenses as those set forth in the complaints; that the *nolle prosse*, together with the pleas of *nolo* to the other indictment in No. 173, and to the other count in No. 236, constituted a compromise with the Government; and that under *United States* v. *Chouteau*, 102 U. S. 603, they are protected against further proceedings on all compromised offenses. We cannot agree that an indictment or count dismissed before trial places a defendant in jeopardy within the meaning of the Constitution, and we believe that the *Chouteau* case must be limited to the peculiar situation there before the Court in which a formal legal compromise had been approved by the Attorney General and the Secretary of the Treasury. In any event, the indictments dismissed in No. 173 (see R. 323-329) appear to charge an offense under Section 35 of the Criminal Code (18 U. S. C., sec. 80) substantially the same as that described in the second clause of R. S. 5438, but not the same as those defined in the first and third clauses. The first count of the indictment in No. 236 (R. 26-34), which was also *nolle prossed*, charges a violation of the Conspiracy Act (Criminal Code, Section 37, 18 U. S. C., sec. 88). This count is substantially the same as the main indictment in No. 173, and for the reasons set forth in the text, we do not think the Conspiracy Act charges an offense identical with that described in Section 5438.

indictments, it will be faced with the question of whether the principle of double jeopardy applies to actions brought under R. S. 3490.

In a series of cases of which the most recent is *United States* v. *La Franca*, 282 U. S. 568, it has been held that various types of penalties, though recoverable in civil actions, are still "a punishment for the infraction of the law," with the result that "a former acquittal or conviction may be invoked to protect against a second punishment for the same offence" (*id.* at 573–574; *United States* v. *Chouteau*, 102 U. S. 603; *Coffey* v. *United States*, 116 U. S. 436; *United States* v. *McKee*, 26 Fed. Cas. No. 15,688 (C. C. E. D. Mo.); *United States* v. *Gates*, 25 Fed. Cas. No. 15,191 (S. D. N. Y.); *United States* v. *Glidden Co.*, 78 F. (2d) 639 (C. C. A. 6), certiorari denied, 296 U. S. 652; cf. *United States* v. *Glidden Co.*, 119 F. (2d) 235, certiorari denied, 314 U. S. 678).[20]

In the most recent pronouncement on the subject, *Helvering* v. *Mitchell*, 303 U. S. 391, the Court, after comprehensibly reviewing the previous authorities, adopted a somewhat different approach. The Court declared that (p. 399) "Congress may impose both a criminal and civil sanction in respect of the same act" and that the question as to whether a criminal sanction was imposed

[20] These cases do not consider whether the offenses previously charged were identical, but assume that they were. We assume that the rule as to the necessity of identical offenses is the same for a penalty suit following an indictment as for two indictments.

"is one of statutory construction." The crucial distinction, which the Court conceded had not theretofore "generally been specifically enunciated," was "between sanctions that are remedial and those that are punitive" (*id.*, at 400n). If Congress intended that a sanction be primarily remedial, the severity of the penalty would not be controlling (*id.*, at 400). The payment of sums of money was cited as illustrative of the type of sanction "enforcible by civil proceedings" (*ibid.*). Such a requirement was treated as remedial even though the payment was to be double the value of the Government's loss, since the additional recovery would "reimburse the Government for the heavy expense of investigation and the loss resulting from the * * * fraud" (*id.*, at 401, citing *Stockwell* v. *United States*, 13 Wall. 531).[21]

The provision for double damages in Section 3490 can clearly be classed as remedial, to the same extent as the sanction upheld in the *Stockwell* case. Even when half of it goes to the informer, its effect is to reimburse him for the cost of the investigation which he has undertaken in the place of the Government.[22] The provision for the forfeiture of $2,000 can be treated as in the same category, and

[21] The above language referred to frauds by taxpayers, but we see no reason why it is not equally applicable to persons who defraud the United States Treasury by other means.

[22] That is not true, of course, in cases such as these, when the Government has completed its investigation and the informer's case is based upon the facts revealed by the Government's prior inquiry.

also as a means to provide a motive for suing in cases where the actual loss is so small that a suit to recover it alone would hardly be justified. But the forfeiture may also be regarded as having the attributes of a fine or punitive exaction. We are inclined to the view that the forfeiture, at least, is more closely akin to the penalties held to be criminal in nature in the *La Franca* case and its predecessors than to the fifty percent "Addition to the Tax" held to be a civil sanction in the *Mitchell* case.

The *Mitchell* case, however, declares that the question is one of statutory construction; if this is so, the intention of Congress in enacting the particular statute must be controlling. It would accordingly be unnecessary to match the sanctions here imposed with those considered in other cases to see which afford the closest parallel.

The legislative history of the Act of March 2, 1863, 12 Stat. 696, is illuminating in several respects. When the original bill was introduced in the Senate (S. 467, 37th Cong., 3d Sess.), Sec. 3, the predecessor to R. S. 3490, provided for a forfeiture of $2,000 and the payment of double damages. In the explanation given by Senator Howard, quoted *supra*, pp. 16–17 (Cong. Globe, 37th Cong., 3d Sess., pp. 955–956), he stated that these clauses prescribed a "mode of proceeding to punish persons", and provided the "most expeditious way * * * of bringing rogues to justice." There was an objection by Senator Cowan that

such acts should be made crimes and punished in the criminal courts by imprisonment, quasi-criminal prosecution being too lenient (*id.* at 954–955). Although this protest was ineffective in the Senate, the House amended Sec. 3 by adding at the end the words "And every such person shall, *in addition thereto,* on conviction in any court of competent jurisdiction, be punished by imprisonment not less than one nor more than five years", or by fine. [Italics supplied.] The amendment was passed without discussion (*id.* p. 1307) and the Senate concurred therein without debate (*id.* p. 1323).

When this Act was incorporated in the Revised Statutes in 1874, Sec. 3 became R. S. 3490, and the criminal sanction, along with similar provisions in Sec. 1, was transferred to R. S. 5438. These changes did not in any way alter the meaning of the provisions; the Revised Statutes were not intended to change the substance of the law, but to condense and consolidate it (2 Cong. Rec. 129, 646, 819, 820). Thus the intention of Congress in 1863 would still be controlling as to the meaning of the Act as embodied in the Revised Statutes.

We think it fair to infer from the above that Congress regarded the action for forfeiture and double damages as punitive, but not as criminal. Clearly the Senate intended the original statute, which failed to provide for fine and imprisonment, to be a method of punishment, and we doubt that this object disappeared with addition of the strictly

criminal sanction. On the other hand the House amendment makes it as clear as language can that offenders were to be punished by fine and imprisonment *in addition* to the other penalties. Since Congress was, of course, aware of the prohibition in the Fifth Amendment against twice being put in jeopardy, the requirement that both sanctions be used manifests a legislative understanding that only the second of the sanctions was criminal in nature. It would not be proper to attribute to Congress an intention that the statute be construed in a way which would make it unconstitutional on its face (*United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; *United States* v. *Standard Brewery*, 251 U. S. 210, 220; *Baender* v. *Barnett*, 255 U. S. 224, 226). The assumption that the *qui tam* suit was civil in nature was probably based on earlier authorities treating such actions as civil proceedings. 1 Bac. Abr. (7th Eng. Ed., 1832), p. 87; *Commonwealth* v. *Churchill*, 5 Mass. 174, 175–176 (1809); *Atcheson* v. *Everitt*, 1 Cowp. 382, 391 (1776); *Cole* v. *Smith*, 4 Johns. (N. Y.) 193, 196 (1809). The provision against double jeopardy in the Fifth Amendment, as well as the 1863 Act, must be construed in the light of this well-established understanding that *qui tam* suits were not criminal.

There is thus presented a situation in which Congress intended the sanction to be civil, but also regarded it as punitive rather than remedial. The decisions before the *Mitchell* case and the line

drawn in that opinion between remedial and punitive sanctions would lead to the conclusion that the penalties found in R. S. 3490 are essentially criminal. The statement in the *Mitchell* case that the question is one of statutory construction, which implies that the intention of Congress is controlling, would lead to a contrary result, unless it means that the question with respect to which the statute must be construed is whether the sanction was intended to be remedial or punitive, not whether it was to be criminal or civil. We find it difficult to believe that the Court would accept as binding for constitutional purposes the intention of Congress that a sanction be civil without regard for the nature of the exaction.

Apart from the considerations of policy, discussed *supra*, pp. 46–48, we would probably reach the conclusion that an action under R. S. 3490 is punitive, at least when brought by the Government, and therefore, essentially criminal. We are reluctant to believe, however, that a suit by a private individual can bar the Government from enforcing the criminal law. We recognize the logical difficulty in differentiating between the two situations. The question, as presented in these cases, is in our opinion a close one, and we are uncertain as to how it should be answered. Since, if the Court agrees with our contention that the respondents were not twice put in jeopardy for the reason that the indictments and the complaints charge different of-

fenses, or if our interpretation of R. S. 3490 is adopted (see Point I, pp. 9–24, *supra*), a decision on this point will not be necessary, we do not feel compelled to state a definite conclusion on the present question.

Respectfully submitted.

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APPENDIX

A

Sections 3490–3493 of the Revised Statutes (12 Stat. 696, 31 U. S. C., Sections 231–234) read as follows:

Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

Sec. 3491. The several district courts of the United States, the Supreme Court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such

person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

SEC. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

SEC. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

B

Section 5438 of the Revised Statutes, 12 Stat. 696, reads as follows:

> Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other

paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars.

C

Section 37 of the Criminal Code (18 U. S. C., Section 88) reads as follows:

§ 88. (Criminal Code, section 37.) *Conspiring to commit offense against United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

D

Section 9 of the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, 118, reads as follows:

> Sec. 9. Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than one year, or both.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 173

UNITED STATES OF AMERICA ex Rel. MORRIS L. MARCUS and MORRIS L. MARCUS in His Own Behalf,
Petitioner,

vs.

WILLIAM F. HESS ET AL.,
Respondents.

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Brief Statement of Grounds for This Petition.

This petition is not a futile effort to induce the Court to change its opinion and construction of the statutes here involved.

But we would respectfully submit that the Court, in its preoccupation with major issues, naturally gave *no consideration* to the serious errors committed in the *trial* of this case. The Circuit Court of Appeals ex-

pressly found it "unnecessary to pass on" these issues because of its ruling that the present informer suit was not authorized by the federal statutes.

This Court has reversed the holding of the Circuit Court of Appeals and held the suit to be authorized, whereupon it might have been expected that the Court would remand the case to the Circuit Court of Appeals for a necessary review of errors assigned by respondents in their appeal from the adverse judgment of the trial court.

> "As the view of the Circuit Court of Appeals that the receiver was without authority to bring the action against Leach & Company was erroneous, its judgment must be reversed. And since it did not determine the merits of the receiver's claim, the case will be remanded to that court with instructions to proceed to that end in conformity with this opinion." *Grant v. Leach & Co.*, 280 U. S. 351, 363.

Of course this Court *could* undertake to review the assignments of error made on appeal from the District Court, but not considered by the Circuit Court of Appeals. But it is apparent (as we shall hereafter demonstrate) that the Court did not follow this alternative practice, but actually affirmed the judgment of the District Court upon the mistaken impression either that no substantial errors had been assigned or that the Circuit Court of Appeals had already ruled against the contentions of respondents.

Under these circumstances, respondents seek, by this petition, relief to which they are clearly entitled in the form of either (1) the grant of a rehearing so that the Court may give full and fair consideration to assignments of gross errors in the trial of this case; or (2) a modification of the order of the Court so that the case may be remanded to the Circuit Court of Appeals with

instructions to proceed in conformity with the opinion of the Court.

TWO MAJOR ERRORS NOT YET REVIEWED BY ANY COURT

I. The Measure of Damages.

The entire amount of damages found in the verdict of the jury—$203,000—could only have been reached by the jury following a rule of damages laid down in the charge of the trial court which seems, at first, plausible but which, on examination, becomes so absurd that it could never be approved by this Court after any careful consideration.

The statute required the jury to ascertain the amount of damages which the United States may have sustained by virtue of collusive, fraudulent bidding on electrical work.

(Counsel make no effort to excuse or palliate the wrongdoing of respondents, but do insist that they should be penalized in accordance with the law and not by any indefensible misapplication of the law.)

In order to estimate the damages sustained by the United States, it must be first determined that a fraudulent increase in the cost of electrical work operated to increase the payments made by the United States. It must be understood at the outset that the P. W. A. grant from the United States was 45% (or, in some instances, 30%) of the *estimated cost* of the project, which was approved *before* any bids were asked or submitted from those who were to do the work. Therefore, after the United States had agreed to pay the municipality an amount specifically limited in dollars and cents (R. 163) to defray part of the cost of a public project, the United States could not be damaged to the extent of one dollar by any excessive charge for work unless that excessive charge *prevented a diminution* of the pay-

ment which the United States had promised to make. No excessive bid could *increase* the United States' payment.

Possibly the court below, or this Court, may have been misled into thinking that the United States agreed to pay 45% of the final cost of a project, not understanding that, in fact, the United States agreed to pay a specific amount which, under the law, could not exceed 45% of the *pre-determined* cost of the project. Or this Court may have thought that the estimated cost of the project approved by the United States was based on bids or estimates submitted by the defendants.[1] This is not the fact.

Now it may or may not have been a fact that in some of the projects involved in this case the total cost was less than the estimated cost, and as a result the United States' payment would be reduced from the maximum amount of the approved grant to the amount of 45% of actual cost. In *such* a case, if the actual cost were increased above a reasonable amount because of fraudulent or collusive bidding, then the United States would be damaged to the extent of 45% of the excessive charge. Likewise, if, because of an excessive charge, the United States were compelled to pay the full amount of the grant instead of a somewhat smaller amount, damage would be sustained.

The foregoing statements, which are hardly debatable, should make it clear that a necessary element of proof of damages would be evidence of the estimated and actual cost of the projects—then evidence of the

[1] The statement is mistakenly made in the opinion of this court that the taint of fraud "entered into every swollen estimate which was the basic cause of every dollar paid by the P. W. A. into the joint fund for the benefit of respondents". As a matter of fact *no* "swollen estimate" made by a respondent was the basis of any P. W. A. grant; and the record proves that the *bids* of respondents, which were *made after* the P. W. A. grant was made, did not affect or cause the payment of a single additional dollar by P. W. A. in aid of at least some of these projects . . . as will be demonstrated hereafter.

electrical bid and the reasonable cost of the electrical work, then a computation to determine to what extent, *if any*, the alleged excessive cost resulted in a payment by the United States larger than the United States' payment if the electrical bid had equalled the reasonable cost.

The informer-plaintiff was not required by the ruling of the trial court to present such essential evidence, nor did he present it. On the contrary, the plaintiff's faulty and misleading computation of damages was not only presented in evidence, but the court allowed it to be taken by the jury as a correct calculation based on the plaintiff's evidence, which the court sustained as proper and adequate. (R. 142, 146) Also, the court refused to instruct the jury to the effect that, in any case where the United States would have paid the maximum amount of its grant even if there had been no excessive charge for electrical work, the United States sustained no damage. (R. 335) The following tabulations, based on the plaintiff's own evidence, show the utter inaccuracy of the plaintiff's computation of damages and the serious error of the trial court in approving plaintiff's method of computing damages:

MILLER SCHOOL

Electrical Contract Actual Cost			$24,152.00
Informer's Estimate of "Fair" Cost			14,023.10
Alleged Excessive Cost			$10,128.90
Total Actual Cost	$289,879.69		
Deduct Excessive Cost	10,128.90		
Total Reasonable Cost	$279,750.79		
Original Estimated Cost	$225,647.00		
PWA Grant (45%) *Maximum*	101,541.00	—Payable even if there had been no excessive charge for electrical work.	

But informer claimed and was allowed damages of $4,558.00.

CRESCENT SCHOOL

Electrical Contract Actual Cost	$34,940.00
Informer's Estimate of "Fair" Cost	20,342.73
Alleged Excessive Cost	$14,597.27

Total Actual Cost	$600,281.20	
Deduct Excessive Cost	14,597.27	
Total Reasonable Cost	$585,683.93	
Original Estimated Cost	$543,860.00	
PWA Grant (45%) *Maximum*	244,737.00	—Payable even if there had been no excessive charge for electrical work.

But informer claimed and was allowed damages of $6,568.77.

SNOWDEN TOWNSHIP SCHOOL

Electrical Contract Actual Cost		$4,200.00
Informer's Estimate of "Fair" Cost		3,539.68
Alleged Excessive Cost		$660.32
Total Actual Cost	$62,633.15	
Deduct Excessive Cost	660.32	
Total Reasonable Cost	$61,972.83	
Original Estimated Cost	$52,727.00	
PWA Grant (45%) *Maximum*	23,727.00	—Payable even if there had been no excessive charge for electrical work.

But informer claimed and was allowed damages of $297.14.

In the Miller, Crescent and Snowden Projects alone —informer claimed and was allowed double damages totalling $22,847.82 which could not possibly have been authorized by the statute.

The plaintiff-informer failed to produce evidence, except as to the foregoing three projects, from which it could be determined how many other projects likewise involved *no possible loss* to the United States because of excessive costs of electrical work. Since the burden of proof was on the plaintiff it is thus apparent that the plaintiff did not prove that *any* damages had been sustained. He merely submitted evidence that damages *might* have been sustained. It is elementary that such proof is insufficient. (*Keogh vs. C. & N. W. Ry. Co.*, 260 U. S. 156, 165.)

The trial judge said: "We cannot follow this argument". (R. 370) This, we submit, is no answer to the invocation of a rule of evidence which should be under-

stood and correctly applied by a first year law student. Certainly the Supreme Court will not countenance such an utter disregard of well settled law.

Now it might appear that the Supreme Court gave consideration to this assignment of error because the issue was presented and briefly discussed in respondents' brief in the Supreme Court. But it is evident that the Court either gave this error no consideration or was misled by inexcusable misstatements in petitioner's reply brief for the following reasons:

1. The plaintiff's method of computing damages is indefensible when the facts are understood..

2. The plaintiff-petitioner did not file his reply brief, and respondents did not receive a copy, until about an hour before the case was called for argument. In that reply brief (p. 24), counsel for petitioner made the following false statement: "Indeed respondents later in their argument admit that the rule applied is proper saying 'We have raised no question about that being the proper measure of damages' ". Reference is then made to respondents' brief, page 109, where respondents simply said that the proper measure of damages would be "the money which the government contributed to each project in excess of what it would have paid had there been fair and open competition".

Counsel for petitioner, in the reply brief, further said (p. 25): "Neither of the courts below accepted respondents' argument and the Circuit Court of Appeals very properly held that by respondents' acts 'the government was defrauded in that it was compelled to contribute more for the electric work * * * than it would have been required to pay had there been free competition in the open market' ". This statement was inexcusably misleading. First, the trial court did not accept respondents' argument on this point; and refused to make the charge requested. Second, the Circuit Court of Ap-

peals never passed on *this* issue as to the proper *evidence* for measuring the damages but, unfortunately, made the general statement quoted, without passing on the question of what *evidence* would be necessary to show in a particular case that the United States sustained damages because more had been paid for electric work than if there had been free competition in the open market.

3. The Supreme Court was evidently deceived by the misleading statements of petitioner's counsel because, in the next to the last sentence of the opinion, the Court said: "We have examined the other contentions of the respondents and approve of the disposition of them by the courts below". None of these contentions of respondents was even considered by the Circuit Court of Appeals, and, because of this misunderstanding, they were evidently not given adequate consideration, if any, by the Supreme Court.

4. Finally, upon the oral argument, counsel for respondents, realized, on a hasty reading of the reply brief, that attention should be called to its misstatements, and started to argue the errors of the trial court as well as the single issue decided by the Circuit Court of Appeals. *But they were deterred by the Chief Justice who stated that in the event of a reversal the practice would be to remand the case for further action by the Circuit Court of Appeals.*

Counsel realize, upon a study of the precedents, that this Court might properly either remand the case or, upon a full consideration of the record, proceed to a complete decision. But if the Court should prefer, in this case, not to remand but to make a complete decision, we earnestly submit that a rehearing should be granted in order that the really important issues raised by assignments of error in the Circuit Court

of Appeals should be given full consideration. We point out that by its opinion, which permits an informer to start a private suit for damages against any person indicted by the United States with no more effort than to copy the indictment, the inevitable consequence will be a mass of such suits. The proper rule for measuring damages, and the proper evidence of damages in such suits thus becomes a matter of far-reaching interest. The assignment of error we have just discussed and the ones to be discussed hereafter raise issues which will not be settled without authoritative rulings from this Court. We submit that such issues should not be apparently decided by this Court without full and adequate consideration.

II. Evidence of Damages.

The evidence of damages upon which plaintiff relied consisted of the testimony of one "expert witness".

Evidence of this character may be regarded as proper and, in some instances, perhaps the only available evidence. But it should be plain that the testimony of an expert witness upon the very vital matter of damages, when the plaintiff has a personal interest in getting one-half of the damages (although he has suffered no damage) should be scrutinized most carefully, and subject to check by any relevant evidence available. In the present instance, the defendants sought in vain to introduce evidence of the actual costs of doing the electrical work in question. Clearly, electrical contractors, seeking, naturally, to make a profit, are going to hold down their costs as far as possible. They are going to pay for material and labor no more than they are compelled to pay. The best possible check upon the reasonableness of any estimate is a hindsight record of actual costs.

Fraudulent, collusive bidding is a wrong, subject to punishment, but the question as to whether damages resulted is an entirely different question. A group of contractors may seek to divide up work so as to avoid what is sometimes called "destructive competition". They may not be seeking an unfair profit but only assurance of a reasonable profit. Such motive and intention would not absolve them from guilt in the violation of statutory requirements of free competition. But the question in a damage suit is: How far have these wrongful acts actually injured another party?

When estimates are made as the basis for competitive bids, the bidders obviously start with an effort to estimate their actual costs. They will then increase their cost estimate with a margin to cover profit and possible risk of loss. But if, by some method, it were possible, in advance, to estimate with perfect accuracy actual costs, that would provide the foundation for each and every bid.

So, when the question is presented to a court to determine the reasonable cost of work in a free, competitive market, it would seem that the record of actual costs which is available when a job is completed would provide, not only the proper foundation for any estimate of reasonable cost, but also a proper check upon any estimates made on any other basis. The defendants in the present case were denied the right to produce such evidence, which would certainly have shed a clear light upon the reasonableness of the estimates of the solitary "expert witness" for the self-interested plaintiff.

In addition to the offer of defendants to prove actual costs, they offered evidence that such actual costs were fair and reasonable and the lowest prices at which the work could be done in accordance with the respective

contracts. All this evidence was excluded. (R. 122, 123) Not a single authority was cited by the District Court or by learned counsel for the plaintiff for excluding such evidence, whereas, on the other hand, a large number of authorities have been cited by the defendants, the present respondents, among which we may call attention to the following:

Prudence Company v. Fidelity & Deposit Co., 297 U. S. 198;

The Albert Dumois, 177 U. S. 240, 255;

22 C. J., 184, 185.

Under the last citation, many cases are noted to the effect, first, that, while price paid does not by itself furnish a satisfactory test of value, it is a circumstance to be weighed in connection with other evidence; and, second, that evidence of what an article sold for in a bona fide transaction is relevant to prove value and, indeed, may provide the best evidence of value.

Applying this principle to the present case, we submit that the amounts which the defendants paid for labor (in accordance with standard union scales) and the amounts paid for material purchased in the open market, provide the very best evidence of the reasonable cost of the electrical work under consideration. Just because the defendants conspired to eliminate competition between themselves in getting electrical work carries with it no inference that they would be able to get labor (in a strongly unionized field), or to get material from independent manufacturers, at anything different from regular prevailing prices, nor is any such claim made against them.

Furthermore, they had every interest to keep down their costs, and the obvious purpose of conspiring to eliminate competition would be to gain a satisfactory

(perhaps an unreasonable) profit, which would require keeping costs as low as possible. Therefore, the costs actually paid, although not conclusive as to reasonable cost or value of the work, are evidence too plainly material and relevant to be excluded, particularly when defendants offered at the same time to produce further evidence (which was also excluded) that such actual costs were reasonable.

In addition, the plaintiffs relied on that most unreliable of all testimony—the opinion evidence of a so-called expert witness. The law does not look with favor on opinion evidence (22 C. J., 498) and testimony of this character should certainly be subjected to every possible test in order that the jury may correctly appraise its value. Particularly, there should be every check upon the opinion evidence of an expert witness testifying in behalf of an informer plaintiff who has the strongest possible incentive to exaggerate any just claim.

Again, let it be pointed out that the issue in this case was not the common issue of the "value" of property (where original cost may or may not be the best evidence, as has been debated so extensively in public utility rate regulation cases). But the object of the evidence was to show what the government would have paid if there had been fair competition among bidders. Thus, the reasonable cost of doing this exact work *at this time* was the object of inquiry. Since defendants had no possible reason for trying to increase their out-of-pocket costs, the evidence of what they actually paid for labor and materials provides the best evidence of reasonable cost. It would only be necessary to add to this actual cost of labor and material, opinion evidence as to a reasonable profit in order to show most precisely what the government would have had to pay if there had been competitive bidding.

Many of the cases cited by the appellants-defendants in the Circuit Court of Appeals, to sustain their proffered evidence, were contract cases, but they are thoroughly applicable because "the underlying principles governing an award of damages are the same whether the action is in contract or in tort and do not depend upon its form". (17 C. J. 717, 752; *Hetzel v. B. & O. R. Co.*, 169 U. S. 26, 38)

There is a close parallel between the proper measure of damages in this case and that which was approved in *Straus v. Victor Talking Machine Co.*, 297 Fed. 791, a case cited with approval by the Supreme Court in the recent case, *Story Parchment Co. v. Paterson Company*, 282 U. S. 555.

The Circuit Court of Appeals, in the Straus case, approved the evidence of damages which were claimed in a treble damage suit under the provisions of the anti-trust laws. The plaintiffs, as retailers, sued for loss of profits resulting because the Victor Company refused to allow its distributors to sell to the plaintiffs at the customary dealer's discounts. In the language of the court (page 802), the position of the plaintiffs was "that they were entitled to buy goods in a free market; that they were prevented from doing this by defendants' illegal combination; that they were forced, therefore, to buy in the market which defendants had created, and were thus compelled to pay more for their goods than the price which in that market was the fair and reasonable price established by defendants themselves". The plaintiffs proved their case and were given damages based on evidence of the prices "established by the defendants themselves", which were accepted as fair and reasonable prices.

The issue in the Straus case was essentially the same as in the present case, i. e., what damage was caused because, by virtue of an illegal conspiracy, the plaintiffs were compelled to pay more than a reasonable price.

The actual prices *charged by the defendants* were held proper evidence of fair and reasonable prices. In the present case, we are only contending that the actual prices *paid* by the defendants to third parties were proper evidence in computing the reasonable cost of work done by the defendants. We submit that the reasoning in the Straus case is pertinent and sound.

A recent case decided by the United States Court of Appeals for the District of Columbia is also in point. In *Nunan v. Timberlake*, 85 F. (2d) 407, the court held that in a suit for damages plaintiff could make a prima facie case by proving the amount of bills paid or incurred for professional services, even without supplemental testimony as to the reasonable value of the services. The court also allowed evidence of the original cost of damaged apparel, supplemented by testimony as to the age of the articles and the nature of the injury to them.

We suggest that if an informer-plaintiff had access to defendants' actual costs and sought to introduce such evidence in order to prove *exorbitant* profits and, thereby, establish damages, a court would hardly think of excluding such evidence. When it happens that such evidence is sufficiently favorable so that defendants themselves desire to introduce it, supported by testimony as to the reasonableness of out-of-pocket costs, the evidence should not be excluded.

In conclusion, on this point, we submit that in view of the large number of cases which may be, and already have been, brought by an informer or by the government to recover damages for alleged frauds of the character here involved a ruling on this point is most important. There should be no question of the right of defendants to introduce evidence of actual costs and evidence of their reasonableness, as a necessary check upon exaggerated estimates of damages produced by

interested "expert" witnesses. Otherwise, it might appear, from the present opinion of the Court, that the exclusion of highly relevant material evidence of actual costs had been sanctioned by this high tribunal.

TWO FURTHER ERRORS OF TRIAL COURT WHICH SHOULD BE CORRECTED

III. Multiplying the Statutory Forfeit.

The statute under which this suit was brought provides explicitly for the payment of a forfeit in the sum of $2,000 "and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing of such act". The District Court held that the $2,000 forfeit could be assessed for each project, and the Supreme Court, in its opinion, specifically approves this ruling.

We think the Court has overlooked the fact that the crime for which the defendants were required to respond in damages was a conspiracy to defraud the government, and *that* was the *act* which gave rise to a liability to forfeit $2,000 and to pay, in addition, double the amount of damages sustained. The opinion points out that the liability upon each conspirator arose "without regard to whether that person had direct contractual relations with the government". It is entirely clear that no contractor presented any claim for payment or made any false claims (applying the law as it has been construed by the Supreme Court) except in connection with a project wherein *that contractor* did the work.

If the jury had been asked to separate the wrongdoing of each contractor and to hold him responsible for damages and a forfeiture because of his acts in connection with a single project, an entirely different verdict would have been sought and rendered. On the contrary, the District Court expressly stated in its opinion: "This

is a conspiracy case where the rule applies that each contractor is liable for all the acts of his co-conspirators done in pursuance of the conspiracy". (R. 375) The District Court charged the jury elaborately as to the law of conspiracy and held that "the plaintiffs in this case have the burden of showing by the fair weight of testimony that the defendants were engaged in a conspiracy to defraud the United States". (R. 139) The District Court submitted several forms of a verdict to the jury, and made this statement: "If you find a verdict against all of the defendants, you need not mention them by name but it would be sufficient for you merely to say 'We find a verdict for the sum of (blank) dollars against all the defendants' ". (R. 146)

Nevertheless, the court then held that if the jury found that a conspiracy existed, the penalty of $2,000 should be assessed for each project in which there had been collusive bidding, not only the forty-eight in which inadequate evidence had been offered to show actual damage suffered by the United States, but also eight others in which there was no evidence of actual damage suffered. The jury found a verdict in one lump "sum of $315,100.91, being $203,100.91 damages and $112,000 penalty". (R. 338)

If the jury had found a wrongful act in connection with each project, it would have been necessary, in accordance with the statute, to return a verdict for a $2,000 forfeiture and, in addition, the damage in connection with that project; instead of which, the jury followed the ruling of the court in assessing the *damages* for *one* wrongful act (R. 381) (the conspiracy, which the court described in its opinion as the "collusive bidding plan") (R. 375) and then proceeded, in accordance with the erroneous instruction of the court, to assess a *penalty* for each project (56 in all), although it had not found the defendants or any of them sepa-

rately guilty of a wrongful act in connection with a particular project.

The action of the jury is made plain in the verdict first brought in which read as follows: (R. 370)

> "And now, to wit March 22, 1941, we, the Jurors empaneled in the above-entitled case, find the defendants guilty as charged in the indictment and award damages in the sum of Two hundred three Thousand one thousand *(sic)* dollars and ninety one cents (203,100.91) plus the penalty of One hundred twelve thousand dollars Total $315100 91/100—The jury absolves Mr Robt C Carmack from damages in this suit
>
> "Walter S. Colmery—Foreman"

We submit that a conspiracy should not be arbitrarily divided into a series of wrongful acts. Upon that theory, it would be often possible, first, to divide a conspiracy into innumerable wrongful acts and then to divide the *results* of the conspiracy into a series of innumerable wrongful acts. Indeed, the ingenious counsel for plaintiffs contended that each affidavit or certificate on which payments were made created a liability for the $2,000 penalty.

We submit that an earlier opinion of this Court written by Mr. Justice Holmes accurately describes a conspiracy in restraint of trade (which is the real conspiracy here involved) as a continuing and single offense. The learned Justice makes the following pertinent observations:

> "But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct con-

spiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success. * * *" *U. S. vs. Kissel*, 218 U. S. 601, 607.

There is a clear distinction between a prosecution for the theft of mail from separate bags in a post office and the present suit to recover the penalty here involved in Section 3490. The statute involved in the mail bag case was intended, as the court held *(Ebeling v. Morgan*, 237 U. S. 625, 629) "to protect each and every mail bag from felonious injury and mutilation". The statute under present consideration provides specifically for a single forfeit of $2,000 and "in addition" double damages—"such forfeiture and damages shall be sued for in the same suit". Whatever acts prohibited by Section 5438 have been committed, the suit is intended to cover all damages and a single forfeiture. This is emphasized by the provision of Section 3492 to the effect that a person accused may be arrested and held to bail "not exceeding the sum of $2,000 and twice the amount of the damages sworn to in the affidavit of the person bringing the suit". Clearly, the lawmakers did not contemplate a recovery greater than $2,000 plus double damages.

If the informer had undertaken the more difficult task of suing separately the defendants, holding each responsible only for the damages caused by any false claims he might have made, then the utmost verdict against each defendant would have been a forfeiture of $2,000 plus a limited amount of double damages. But the informer made the choice of suing all defendants

jointly for the single, continuing offense of conspiring to defraud the government, thereby making it possible to impose joint and several liability for the total damages. Having obtained this benefit of proceeding on the basis of a single, common offense, he then sought to have the offense divided into a series of offenses so numerous that the District Court would not follow him that far. But the court did allow the assessment of a penalty fifty-six times the amount fixed in the statute by assessing the penalty separately as to each project, as though fifty-six suits had been brought, charging fifty-six separate liabilities. Whereas, in fact, in conformity with the statute, there is only one suit with a single liability for one forfeiture and for the total double damages: "Such forfeiture and damages shall be sued for in the same suit". (Rev. Stat. Sec. 3490)

It is suggested in the opinion of the Supreme Court that the Congress did not mean to reduce the damages recoverable for respondents' fraud and thereby allow them to spread the burden progressively thinner over projects, each of which individually increased their profit. The fact is that by suing the defendants jointly for a conspiracy and thereby making it possible to increase the damages recoverable from any one defendant, the burden, instead of being spread thinner, has been spread so thickly that no one can tell how heavy it may be upon those who are eventually compelled to pay. We submit that since the defendants were tried and convicted for conspiracy, the penalty provided in the statute could only be assessed once.

IV. The Nolo Contendere Plea.

There was one further violation of the rights of respondents which this court would certainly not wish to approve even *sub silentio.*

The first objective of the trial was to determine

whether the defendants were guilty of a crime as the basis for a civil liability. They were entitled to the verdict of an unprejudiced jury. The law is well settled that their previous pleas of *nolo contendere* could not be used as an admission of civil liability. *(Tucker v. U. S.*, 196 Fed 260, 262) Nevertheless, counsel for the informer-plaintiff persisted in arguing to the jury that the defendants had admitted their guilt by pleading *nolo contendere* and offering no defense to criminal charges. The very gentle rebuke of the court (R. 127-129) did not at all cure the harm done and the court denied defendants' motion for the withdrawal of a juror.

The excuse was offered that counsel for defendants had referred themselves to the plea of *nolo contendere.* The fact was that counsel for defendants had sought to prove by the testimony of the government prosecutor in the criminal case that the plea of *nolo contendere* had been made as the result of an agreement with the government that whatever punishment the court imposed on the conspiracy indictment would be in satisfaction of all criminal liability of the defendants on indictments for the alleged conspiracy, for false certificates and for affidavits of non-collusion, which were the subject of additional indictments. Counsel for defendants sought to offer this testimony in support of their plea of double jeopardy. When the court declined to permit the testimony of the Special Assistant to the Attorney General and overruled the plea of double jeopardy, there was no further basis for adverting to the plea of *nolo contendere*, except the improper purpose of persuading the jury that they should find defendants guilty on the ground that defendants had already admitted their guilt. To allow counsel for the informer-plaintiff, under the circumstances, not only to refer to the plea but also to argue to the jury hypocritically that, although it "cannot be used as evidence

of guilt in this particular case", these defendants had pleaded *nolo contendere* to the same charges when made in the criminal court, was a gross violation of the rights of the defendants. It amounted to assuring the jury that there was no question of the guilt of the defendants—that they had admitted defrauding the government in every project under consideration (which was not true)—and that therefore all that was left was for the jury to assess the amount of damages.

Even though this present prosecution may be described as a civil action, it was an action requiring the jury to find, as a basis for liability, that the defendants were guilty of a crime, or a series of crimes. Defendants were certainly entitled to have that issue submitted to the jury without the improper contention that they had already confessed their guilt. On this point, we also submit that the silent sanction of the Supreme Court should not be given to such a flagrant violation of the rights of defendants.

Conclusion.

For the reasons heretofore given, we submit that either a rehearing should be granted, in order that this Court may give full consideration to the serious errors of the trial court not heretofore reviewed by any court, or that the order of the Court should remand the case to the Circuit Court of Appeals for action there in conformity with the opinion of this Court.

Respectfully submitted,
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CERTIFICATE OF COUNSEL.

We, Donald R. Richberg, William H. Eckert, Eugene B. Strassburger and John B. Nicklas, Jr., attorneys for respondents, William F. Hess et al., do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Dated, Washington, D. C.
February 11, 1943.

DONALD R. RICHBERG,
WILLIAM H. ECKERT,
EUGENE B. STRASSBURGER,
JOHN B. NICKLAS, JR.,
Attorneys for Respondents.

pp. 6, 11, 14, 15 of Frankfurter J.

SUPREME COURT OF THE UNITED STATES.

No. 173.—October Term, 1942.

United States of America *ex rel.* Morris L. Marcus and Morris L. Marcus in His Own Behalf, Petitioner, *vs.* William F. Hess et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 18, 1943.]

Mr. Justice Black delivered the opinion of the Court.

Respondents, electrical contractors, were employed to work on P. W. A. projects in the Pittsburgh area. Their contracts were made with local governmental units rather than with the United States government, but a substantial portion of their pay came from the United States. Charging the respondents with defrauding the United States through the device of collusive bidding on these projects,[1] the petitioner, in the name of the United States and on his own behalf brought this action under § 5438 and §§ 3490-3493 (31 U. S. C. §§ 231-234) of the Revised Statutes.

These sections, now distributed through the statutes, are parts of what was originally the Act of March 2, 1863, 12 Stat. 696. Section 5438 contains that portion of the original Act which makes certain efforts to defraud the government a crime punishable by fine and imprisonment.[2] Section 3490 separately provides that

[1] The nature of the collusive bidding scheme was described by the court below as follows: "The appellants, the officers and members of the Electrical Contractors Association of Pittsburgh, conspired to rig the bidding on these projects. The pattern of the collusion was the informal and private averaging of the prospective bid which might have been submitted by each appellant. An appellant chosen by the others would then submit a bid for the averaged amount and the others all submitted higher estimates. The government was thereby defrauded in that it was compelled to contribute more for the electric work on the projects than it would have been required to pay had there been free competition in the open market." 127 F. 2d 233, 234.

[2] Section 5438 includes three categories of acts subject to the penalty which it prescribes. The first of these clauses, which in our opinion governs the instant case, covers "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military or naval service of the United States, any claim upon or

whoever commits "any" of the prohibited acts shall "forfeit and pay to the United States the sum of two thousand dollars, and in addition, double the amount of damages . . . sustained . . . together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit." Under §§ 3491, 3493, this latter action may be instituted by "any" person in behalf of the government, and where such a qui tam action is brought, half the amount of the recovery is paid to the person instituting the suit while the other half goes to the government.

In the instant case verdict and judgment for $315,000 were rendered against the defendants, of which $203,000 was for double damages and $112,000 was an aggregate of $2,000 sums for 56 violations of § 5438. 41 F. Supp. 197. The Circuit Court of Appeals was of the opinion that the government had been defrauded—a conclusion not challenged here[3]—but held that the particular fraud was not reached by § 5438. It accordingly reversed. 127 F. 2d 233.

First. The Court below, construing § 5438 with "utmost strictness" on the premise that qui tam or informer actions "have always been regarded with disfavor" by the courts, emphasized the absence of a direct contractual relationship between the respondents and the United States, and held that "The claims of the defendants then were simply against the local municipalities. Since the defendants had no claim upon or against the United States, this action was not authorized by the informer statutes."

We can not accept either the interpretive approach or the actual decision of the court below. Qui tam suits have been frequently permitted by legislative action,[4] and have not been without de-

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against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent . . ." The second clause governs the use of false certificates, etc., for the purpose of obtaining or aiding to obtain payment of such a claim, and the third covers conspiracy to defraud the government by obtaining or aiding to obtain the payment of a claim. This section, with amendments not relevant to actions under § 3490, now appears as 18 U. S. C. §§ 80, 83.

[3] Cf. McMullen v. Hoffman, 174 U. S. 639, 649. For the general federal competitive bidding statute see 41 U. S. C. § 5.

[4] "Statutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government," Marvin v. Trout, 199 U. S. 212, 225. Some such statutes are 18 U. S. C. § 23 (arming vessels against friendly powers); 31 U. S. C. §§ 155, 163 (breaches of duty by the Treasurer or the Register of the United States); 25 U. S. C. §§ 193, 201 (protection of Indians); and see footnote 9, *infra*. For a statute dealing with the allocation of costs in penal actions brought by an informer, see 28 U. S. C. § 823. Statutes

fense by the courts.[5] Moreover, this interpretation of "utmost strictness" narrows not only the qui tam aspect of the Act, but also the criminal provisions. The decision below treats the language of § 5438 in such fashion that no criminal proceedings could be brought against the respondents, a result to which the policy on qui tam actions is immaterial even if it exists or could properly be applied. This "qui tam policy" cannot be used to detract from the meaning of the language in the criminal section; and we cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is invoked by an informer.

Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it; to nullify the criminal statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours. Sound rules of statutory interpretation exist to discover and not to direct the Congressional will. True, § 5438 is criminal and for that reason in interpreting so much of its language as it shares in common with Sec. 3490 we must give it careful scrutiny lest those be brought within its reach who are not clearly included; but after such scrutiny we must give it the fair meaning of its intendment. Cf. *U. S.* v. *Raynor*, 302 U. S. 540, 552.

We think the conduct of these respondents comes well within the prohibition of the statute which includes "every person who . . . causes to be presented, for payment . . . any claim upon or against the Government of the United States . . . knowing such claim to be . . . fraudulent." This can best be seen upon consideration of the exact nature of respondents' relation to the government. The contracts found to have been induced by

providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue, Adams v. Woods, 2 Cranch 336.

[5] In support of the view of the court below, see Taft v. Stevens Lith. and Eng. Co., 38 F. 28; but cf. United States v. Griswold 24 F. 2d 361, 366, in which the Court speaking of this section says: "The statute is a remedial one. It is intended to protect the Treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel."

the respondents' frauds were made between them and local municipalities and school districts of Alleghany County, Pennsylvania. A large portion of the money paid the respondents under these contracts was federal in origin, granted by the Federal Public Works Administrator, an official of the United States. 40 U. S. C. 401(a). The jury and both courts have found that the contracts were obtained by a successfully executed conspiracy to remove all possible competition from "competitive bidding." The bidding itself was a federal requirement; all bidders were fully advised that these were P. W. A. projects; and many if not most of the respondents certified that their bids were "genuine and not sham or collusive." While payment itself, in the sense of the direct transferring of checks, was done in the name of local authorities, monthly estimates for payment were submitted by the respondents to the local sponsors on P. W. A. forms which showed the government's participation in the work and called attention to other federal statutes prohibiting fraudulent claims. It was a prerequisite to respondents' payment by the local sponsors that these estimates be filed, transmitted to, and approved by, the P. W. A. authorities. Payment was then made from a joint construction bank account containing both federal and local funds. The work was done under constant federal supervision.

The government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. By their conduct, the respondents thus caused the government to pay claims of the local sponsors in order that they might in turn pay respondents under contracts found to have been executed as the result of the fraudulent bidding. This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the P. W. A. into the joint fund for the benefit of respondents. The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded.

Government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states. While at the time of the passage of the original 1863 Act, federal aid to states consisted primarily of land grants, in subsequent years the state aid program has grown so that in 1941 approximately 10% of all federal money was dis-

tributed in this form.[6] These funds are as much in need of protection from fraudulent claims as any other federal money,[7] and the statute does not make the extent of their safeguard dependent upon the bookkeeping devices used for their distribution. The Senatorial sponsor of this bill broadly asserted that its object was to provide protection against those who would "cheat the United States."[8] The fraud here could not have been any more of an effort to cheat the United States if there had been no state intermediary.

The conclusion that the first clause of § 5438 includes this form of "causing to be presented" a "claim upon or against the government" is strengthened by consideration of the other clauses of the statute. Clause 2 includes those who do the forbidden acts for the purpose of "aiding to obtain" payment of fraudulent claims; Clause 3 covers "any agreement, combination or conspiracy" to defraud the government by "obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim." These provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.

The situation here is in no sense like that discussed in *United States* v. *Cohn*, 270 U. S. 339, 345-347, where the government acted solely as bailee and no person had any claim against it for a payment. The Court in the *Cohn* case held that there had been no "wrongful obtaining of money . . . of the government's", while there has been such a "wrongful obtaining" here on claims which were presented either directly or indirectly to the government with full knowledge by the claimants of their fraudulent basis.

We conclude that these acts are covered by the statute under consideration.

Second. Previous to the filing of this action these respondents were indicted for defrauding the government and on a plea of nolo contendere were fined $54,000. They, and the government which

[6] Key, The Administration of Federal Grants to States, Introduction; Bureau of the Census State and Local Government Special Study No. 19, Federal and State Aid 1941, 4.

[7] See Key, *supra*, Chapter 4 "The Audit".

[8] Congressional Globe, 37th Cong., 3rd Sess., 952.

has filed a brief amicus curiae at our request, assert that the petitioner received their information not by their own investigation, but from the previous indictment; and both argue that §§ 3490-93 should not under such circumstances be construed as permitting suit by the petitioner. The petitioner denies that they relied upon the information contained in the indictment, asserts that they spent money in conducting an investigation of their own, and claim that they presented more evidence that the government had discovered.

Even if, as the government suggests, the petitioner has contributed nothing to the discovery of this crime, they have contributed much to accomplishing one of the purposes for which the Act was passed. Their suit results in a net recovery to the government of $150,000, three times as much as the fines imposed in the criminal proceedings; and this recovery was obtained at the risk of a considerable loss to the petitioner since § 3491 explicitly provides that the informer must bear the risk of having to pay the full cost of the litigation.

Neither the language of the statute nor its history lends support to the contention made by respondents and the government. "Suits may be brought and carried on by any person", says the Act, and there are no words of exception or qualification such as we are asked to find.[9] The Senate sponsor of the bill explicitly pointed out that he was not offering a plan aimed solely at rewarding the conspirator who betrays his fellows, but that even a district attorney, who would presumably gain all knowledge of a fraud from his official position, might sue as the informer:

"The bill offers, in short, a reward to the informer who comes into court and betrays his co-conspirator, if he be such; but it is not confined to that class. Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the qui tam clause, and to one half of the double damages which may be recovered against the persons committing the act."[10]

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[9] There is of course no reason why Congress could not, if it had chosen to do so, have provided specifically for the amount of new information which the informer must produce to be entitled to reward. Simple informers who merely give information without formally instituting actions may collect an award for aiding in the conviction of narcotic law violators "if so directed by the court." 21 U. S. C. § 183. Cf. The authority of the Secretary of Labor who is authorized to approve awards to informers in contract labor cases. 8 U. S. C. §§ 139-140. The right of action itself may be subject to control by an administrative official, as are actions under 18 U. S. C. § 642 concerning violations of shipping laws.

[10] Cong. Globe, *supra*, 955, 956.

The government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what it did. It is said that effective law enforcement requires that control of litigation be left to the Attorney General;[11] that divided control is against the public interest; that the Attorney General might believe that war interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity of profiting from the government's investigations; and finally that conditions have changed since the Act was passed in 1863. But the trouble with these arguments is that they are addressed to the wrong forum. Conditions may have changed, but the statute has not.

Furthermore, one of the chief purposes of the Act, which was itself first passed in war time, was to stimulate action to protect the government against war frauds.[12] To that end, prosecuting attorneys were enjoined to be diligent in enforcement of the Act's provisions, and large rewards were offered to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits.

The very fact that Congress passed this statute shows that it concluded that other considerations of policy outweighed those now emphasized by the government; for most of the arguments made here militate against any informer action at all. Had the government filed a suit prior to that instituted by these petitioners, a different question would be presented. Cf. *Francis* v. *United States*, 5 Wall. 338. Under the circumstances here, we could not, without materially detracting from its clear scope, decline to recognize the petitioner's right to sue under the Act.

Third. As noted above, respondents had previously been indicted and fined for defrauding the government in connection with the

[11] This consideration is apparently directed solely at the Department of Justice's desire to control the institution of these actions rather than their settlement. Sec. 3491 provides that the informer suits "shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court *and the district attorney*, first filed in the case, setting forth their reasons for such consent." The authority thus given the district attorney is presumably aimed at prevention of fraudulent settlements.

[12] For a discussion of the situation which gave rise to the Act, see Report of the House Committee on Government Contracts, March 3, 1863; the discussion in the Senate on this bill, Cong. Globe, *supra*, 952, *et seq.*; the opinion of the court below at 235; and Randall, Civil War and Reconstruction, 419, 427, 633.

same transactions for which they are now being sued. They contend that the present action should be barred because of the "double jeopardy" provision of the Fifth Amendment which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The previous indictment was brought under a general statute dealing with conspiracy to defraud the government, 18 U. S. C. § 88, and is clearly criminal in nature. For violation of it respondents were liable for a fine up to $10,000 or imprisonment for two years, or both. For failure to pay their fines, they could have been sentenced to prison. *Ex parte Watkins*, 7 Pet. 568. The punishment given in that action was not intended to compensate the government, in any manner, for damages it suffered as a result of successful execution of the conspiracy. Respondents' contention was overruled by the District Court and was not considered in the Court of Appeals. It is now urged upon us as an independent ground of support for the judgment reached below. Cf. *Helvering* v. *Gowran*, 302 U. S. 238, 245.

The application of the double jeopardy clause to particular cases has not been an easy task for the courts. The subject has recently been thoroughly explored in *Helvering* v. *Mitchell*, 303 U. S. 391, in which the Court analyzed the cases now pressed upon us and emphasized the line between civil, remedial actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice. Only the latter subject the defendant to "jeopardy" within the constitutional meaning. *Ibid.*, 397, 398. We may start therefore with the language of the *Mitchell* case: "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether . . . [the statute in question] . . . imposes a criminal sanction. That question is one of statutory construction." *Ibid.*, 399. Is the action now before us, consisting of double damages and the $2,000 forfeiture, criminal or remedial?

It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction. The statutes on which this suit rests, makes elaborate provision both for a criminal punishment and a civil remedy. Violators of § 5438 may "be imprisoned at hard labor for not less than one nor more than

five years, or fined not less than one thousand nor more than five thousand dollars." We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it. *Helvering* v. *Mitchell, supra,* 401.

It is, of course, well accepted that for one act a person may be liable both to pay damages and to suffer a criminal penalty. Long ago, this Court said, "A man may be compelled to make reparations in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance to be twice punished for the same offense." *Moore* v. *Illinois,* 14 How. 13, 19, 20. Congress has "power to give an action for damages to an individual who suffers by breach of the law." *Chattanooga Foundry* v. *Atlanta,* 203 U. S. 390, 396, 397. And it has this same power when it, rather than some private individual, is injured by a fraud. Quite aside from its interest as preserver of the peace, the government when spending its money has the same interest in protecting itself from fraudulent practices as it has in protecting any citizen from frauds which may be practiced upon him. "The powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection." *Cotton* v. *United States,* 11 How. 229, 231.

This remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered. As to the double damage provision, it can not be said that there is any recovery in excess of actual loss for the government, since in the nature of the qui tam action the government's half of the double damages is the amount of actual damages proved. But in any case, Congress might have provided here as it did in the anti-trust laws for recovery of "threefold damages . . . sustained and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15.[13] Congress could remain fully in the common law tradition and still provide punitive damages. "By the common

[13] This Court in Meeker v. Lehigh Valley Railroad, 236 U. S. 412, 432-33, sustained the validity of Sections 8 and 16 of the Interstate Commerce Act which authorized payment of attorney fees to shippers injured as a result of violation of the Act by railroads.

as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of civil action and the damages inflicted by way of penalty or punishment given to the party injured." *Davis* v. *Woodworth*, 13 How. 363, 371. This Court has noted the general practice in state statutes of allowing double or treble or even quadruple damages. *Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 512, 523. Punitive or exemplary damages have been held recoverable under a statute like this which combines provision for criminal punishment with others which afford a civil remedy to the individual injured. *O'Sullivan* v. *Felix*, 233 U. S. 318, 324, 325. The law can provide the same measure of damage for the government as it can for an individual.

It is argued that the $2,000 "forfeit and pay" provision is "criminal" rather than "civil" even if the double damage feature is not. The words "forfeit and pay" relate alike to the $2,000 sum and the double damages. The use of the word "forfeit" in conjunction with the word "pay" does not force the conclusion that the provision is criminal. No one doubts that Congress could have accomplished the same result by authorizing "double" or "quadruple" or "punitive" damages or a lump sum payment for attorney's fees, or by definition of the elements of "actual damages." Special consequence cannot be drawn from the use of the word "forfeit". While this might under other circumstances be an appropriate word to suggest a fine upon the failure to pay which an individual might be imprisoned, no such punishment is provided here upon default in payment. The words "forfeit and pay" are wholly consistent with a civil action for damages. *Atchison Railway* v. *Nichols*, 264 U. S. 348, 350-352; cf. *Hepner* v. *United States*, 213 U. S. 103, 104-111.

It is true that "Punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned," but this is not enough to label it as a criminal statute. *Brady* v. *Daly*, 175 U. S. 148, 157. We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. This conclusion is consistent with a statement made immediately before final passage of the bill. A Senator discussing these sections said: "The government ought to have the privilege of coming upon him [a fraudulent contractor] or his estate and his heirs and recovering the

money of which it is defrauded."[14] The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress.

Fourth. Section 3490 requires that the $2,000 forfeit be paid for doing "any" of the acts prohibited by § 5438. Before the District Court, petitioner contended that this sum should be exacted for every form submitted by respondents in the course of their enterprise, while respondent argued that there should be merely one $2,000 sum collected for all the acts done. The district court concluded that the lump sum in damages should be assessed for each separate P. W. A. project. Petitioner does not object to this decision and we conclude that under the circumstances of this case each project can properly be counted separately. The incidence of the fraud on each additional project is as clearly individualized as is the theft of mail from separate bags in a post office, *Ebeling* v. *Morgan*, 237 U. S. 625; and see *Blockburger* v. *United States*, 284 U. S. 299. Cf. *Gavieres* v. *United States*, 220 U. S. 338, 342. Under respondents' view the lump sum to be paid would be about $30.00 a project; and we cannot suppose that Congress meant thus to reduce the damages recoverable for respondents' fraud and thereby allow them to spread the burden progressively thinner over projects each of which individually increased their profit.

We have examined the other contentions of the respondents and approve of the disposition of them by the courts below. The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.

Mr. Justice MURPHY took no part in the consideration or disposition of this case.

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[14] Cong. Globe, *supra*, 958.

SUPREME COURT OF THE UNITED STATES.

No. 173.—October Term, 1942.

The United States of America *ex rel.* Morris L. Marcus, and Morris L. Marcus in his own behalf, Petitioners, *vs.* William F. Hess, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 18, 1943.]

Mr. Justice Frankfurter, concurring.

I agree with the decision of the Court. But it seems to me that the plea of double jeopardy should be rejected on a ground other than that taken by the Court. In all other respects I join in its opinion.

This is a *qui tam* action under R. S. § 3490 to recover a "forfeiture" and "double the amount of damages which the United States may have sustained" by reason of the same acts of fraud for which the respondents were previously indicted under § 37 of the Criminal Code, 18 U. S. C. § 88, and for which substantial fines were imposed upon them. The Fifth Amendment guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb". The respondents invoke this provision as a bar to this suit; and as I understand its holding, the Court rejects this plea of double jeopardy by treating the present action as one merely to make the United States whole for actual loss, and therefore without any punitive elements. The Court reaches this conclusion by applying the distinction taken in *Helvering* v. *Mitchell*, 303 U. S. 391, 400, between "sanctions that are remedial and those that are punitive". The argument seems to run thus: Double jeopardy means attempting to punish criminally twice; this is not an attempt to punish criminally because it is a civil proceeding; it is a civil proceeding because, as a matter of "statutory construction", it is a "civil sanction" which is being enforced here; and the sanction is "civil" because it is "remedial" and not "punitive" in nature.

Such dialectical subleties may serve well enough for purposes of explaining away uncritical language in earlier cases. See, for

instance, *United States* v. *Chouteau*, 102 U. S. 603, and *Coffey* v. *United States*, 116 U. S. 436. But they are too subtle when the problem is one of safeguarding the humane interests for the protection of which the double jeopardy clause was written into the Fifth Amendment.

Punitive ends may be pursued in civil proceedings, and, conversely, the criminal process is frequently employed to attain remedial rather than punitive ends. It is for this reason that *scienter* has not been deemed to be a requirement in some criminal prosecutions. "Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes . . ." *United States* v. *Balint*, 258 U. S. 250, 252.

The protection against twice being punished for the same offense should hardly be made to depend upon the necessarily speculative judgment of a court whether a "forfeiture" and "double the amount of damages which the United States may have sustained" constitutes an extra penalty, or merely an indemnity for loss suffered. If that is the issue on which the protection against double jeopardy turns, those who invoke the Constitution, as do the respondents here, ought to be allowed to prove that, as a matter of fact, the forfeiture and the double damages are punitive because they exceed any amount that could reasonably be regarded as the equivalent of compensation for the Government's loss. That in civil actions punitive damages are, as a matter of due process, sometimes allowed, see *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 69-70, or that there may be distinct penal and remedial provisions for the same wrong, see *O'Sullivan* v. *Felix*, 233 U. S. 318, 325, does not help solve our present problem, which arises when a second separate proceeding against the same persons for the same misconduct results in a plea based upon the double jeopardy clause. We must also put to one side the doctrine of *res judicata*. This is largely a judicial doctrine, though partly reflected in the Full Faith and Credit Clause, Article IV, § 1, and is aimed at avoiding the waste and vexation of relitigating issues already decided between the same parties. The doctrine of double jeopardy has a different history. It is part of the protection of the Constitution against pressures and penalties that offend civilized notions of justice.

and United States v. La Franca, 282 U.S. 568.

In my view the proper approach to the problem of double jeopardy in a situation like this, where Congress has imposed two sanctions for misconduct, however one may label them, and has provided for their enforcement in two separate proceedings, is that which was taken by Judge (later Mr. Justice) Blatchford in *In re Leszynsky*, 16 Blatchf. 9. The short of it is that where two such proceedings merely carry out the remedies which Congress has prescribed in advance for a wrong, they do not twice put a man in jeopardy for the same offense. Congress thereby merely allows the comprehensive penalties which it has imposed to be enforced in separate suits instead of in a single proceeding. By doing this Congress does not impose more than a single punishment. And the double jeopardy clause does not prevent Congress from prescribing such a procedure for the vindication of punitive remedies.

This view commends itself to reason. It is confirmed by history. For legislation of this character, providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional criminal prosecution, and the other a forfeiture proceeding or a civil action as upon a debt, was quite common when the Fifth Amendment was framed by Congress. See, *e. g.*, the materials referred to in *In re Leszynsky, supra*, at 16-19. Like other specific provisions of the Constitution, the double jeopardy clause must be read in the context of its times. It would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause which they had proposed for ratification.

If it be suggested that a succession of separate trials for the enforcement of a great number of criminal sanctions, even though set forth in advance in a single statute, might be a form of cruelty or oppression, the answer is that the Constitution itself has guarded against such an attempt "to wear the accused out by a multitude of cases with accumulated trials", see *Palko* v. *Connecticut*, 302 U. S. 319, 328, by prohibiting "cruel and unusual punishments". Amendment VIII. But short of that which would offend the Eighth Amendment, statutes prescribing cumulative remedies have been commonplaces in the history of federal legislation. The Sherman Law, for example, allows four means of redressing a single offense—criminal prosecution, injunction, seizure of goods, and treble damages. If a *qui tam* action like the one

now before us were to be provided by Congress as a further deterrent against violation of the Sherman Law, it would certainly be commonly regarded as an additional punishment. But the double jeopardy clause would nevertheless not come into play.

It is for these reasons that I think the plea of double jeopardy in this case cannot be sustained.

SUPREME COURT OF THE UNITED STATES.

No. 173.—October Term, 1942.

United States of America *ex rel.* Morris L. Marcus and Morris L. Marcus in His Own Behalf, Petitioners,
vs.
William F. Hess et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 18, 1943.]

Mr. Justice Jackson, dissenting.

I am constrained to dissent from the second division of the opinion and from the conclusion it supports.

I cannot deny that on a literal reading the statute says what the Court's opinion renders it to say. That being the case, one cannot be critical of those who stay close to the words of the statute because guiding principles as to where to depart and in what direction to depart and how far to depart from the literal words of a statute are so conflicting.

But that we have in these matters considerable, although ill-defined, freedom is certain. I could not better state my attitude toward the present statute as applied to this case than in the language of the present Chief Justice in *United States* v. *Katz*, 271 U. S. 354, 357:

"All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

Nor was he announcing unorthodox or unconventional doctrine: In *American Tobacco Company* v. *Werckmeister*, 207 U. S. 284, 293, Mr. Justice Day said:

"But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.

"It is true, and the plaintiff in error cites authorities to the proposition, that where the words of an act are clear and unam-

biguous they will control. But while seeking to gain the legislative intent primarily from the language used we must remember the objects and purposes sought to be attained."[1]

If ever we are justified in reading a statute, not narrowly as through a keyhole, but in the broad light of the evils it aimed at and the good it hoped for, it is here. The only disadvantage therefrom falls on one who sues, not to be made whole for injuries he has sustained, or to recover for goods he has delivered, or services he has performed, but solely to make profitable to himself the wrong done by others. We should, of course, fully sustain informers in proceedings where Congress has utilized their self-interest as an aid to law enforcement. Informers who disclose law violations even for the worst of motives play an important part in making many laws effective. But there is nothing in the text or history of this statute which indicates to me that Congress intended to enrich a mere busybody who copies a Government's indictment as his own complaint and who brings to light no frauds not already disclosed and no injury to the Treasury not already in process of vindication.

In this case the Government investigated respondents and on November 3, 1939, indicted them for conspiracy to defraud. On January 5 and February 6, 1940, the defendants named in the indictment entered pleas of *nolo contendere*, and fines were imposed. While the criminal case was still pending, and on January 25, 1940, petitioner commenced his informer proceeding, the averments in his complaint being substantially a copy of the indictment. It is not shown that he had any original information, that he had added anything by investigations of his own, or that his recovery is based on any fact not disclosed by the Government itself. In the companion case the Government indicted and pleas of *nolo contendere* were entered on January 15, 1940, and two weeks thereafter Ostrager filed his complaint alleging facts substantially identical with those in the indictment, some of the paragraphs being almost verbatim copies. We are informed that these cases have already stimulated a number of other private individuals to intervene with similar action after Government criminal proceedings had disclosed frauds.

I am sure it was never in the mind of Congress to authorize this misuse of the statute. If ever there was a case where the letter

[1] See, also, Ozawa *v.* United States, 260 U. S. 178, 194; Helvering *v.* New York Trust Co., 292 U. S. 455, 464-5; United States *v.* Cooper Corp., 312 U. S. 600.

killeth but the spirit giveth life, it is this. Construed to the letter as the Court does, it becomes an instrument of abuse and corruption which can only be stopped by the timely intervention of Congress. If it were construed according to its spirit to reward those who disclose frauds otherwise concealed or who prosecute frauds otherwise unpunished, it would serve a useful purpose in the enforcement of the law and protection of the Treasury.

Since 1863 this law has been upon the statute books. Never until now has the bar dreamed that it permitted such use. When once it was attempted to commence an informer action under a similar statute after the Government had brought a civil action, this Court promptly limited the statute to preclude that sort of abuse. *Francis* v. *United States*, 5 Wall. 338. There was no specific language in the statute to support that court-made limitation, and although I find no specific language in this statute to support another, I should now say that the same limitation exists where the Government has already possessed itself of the facts and disclosed them in criminal proceedings. This is what I think the profession has generally assumed this statute to mean. If the statute has all these eighty years authorized this sort of proceeding, the legal profession of the United States has been strangely unresponsive to a Congressional proffer of windfall income.

We are justified in determining whether we will accept a new interpretation not before sustained in the history of this statute by reference to the condition of our own times rather than to those of former ones. Nothing better illustrates the difference between the conditions of 1863 and the present than the statement quoted by the Court, made by the Senate sponsor of the Informer Act, "Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the qui tam clause, and to one half of the double damages which may be recovered against the persons committing the act." I do not understand the Court to hold that a prosecuting attorney may now sue, but in construing the statute as applied to the plaintiff now before us we must not forget that the Senator was then speaking of law-enforcement in a nation which had not yet established a Federal Department of Justice, which did not then have a Federal Bureau of Investigation, or a Treasury investigating force, and in which the activities of the Federal Government were so circumscribed that they had not been found necessary. To accept the view of

1863 to mean that today law-enforcement officials could use information gleaned in their investigations to sue as informers for their own profit, would make the law a downright vicious and corrupting one. Fortunately no one in the executive department has ever suspected that such an interpretation as the Court now indulges could be placed upon this statute. If we were to add motives of personal avarice to other prompters of official zeal the time might come when the scandals of law-enforcement would exceed the scandals of its violation.

But even as to non-officials, to permit the informer to recover when he has not actually informed seems to me an evil result unintended by the Act. The Court's interpretation means that the Government cannot institute a criminal action that is not subject to seizure of some interloper who thereby wrests control of its course from the Government itself. As lawyers not without experience in the practicalities of law-enforcement, we know that the trial of a criminal case can be wrecked by pre-trial of the issues on the civil side of the court, particularly if the civil trial is conducted by those not interested in the criminal prosecution. By trial, by taking of depositions, by other devices, the informer may force the premature disclosure of the Government's case, and it is certain that by collusion between one who acts as an informer and the party guilty of fraud the latter could obtain a disclosure of the case against him. We know, too, that the chance of conviction may well be prejudiced if the defendant may go before the jury and point to pending proceedings in which adequate reparations will be made. Every person prosecuted for crime, as a part of the strategy of defeating conviction, wants civil actions brought against him, and oftentimes wants to confess them or settle them in order to plead that he has squared his accounts with the law.

Moreover, we know that the assets of men engaged in criminal activities are rarely equal to the discharge of their obligations and in that event by sharing the available assets with an informer, the Government's financial recovery is diminished.

Also it has been found necessary to vest in someone the power to compromise claims of the Government, either where they are of doubtful collectibility or where the claim itself is of questionable validity. What becomes of the Attorney General's control over litigation in this respect if an informer may be admitted to share in the control of the case and may act in collusion with the guilty

party? May he no longer make a compromise of a case that will withstand subsequent attack by an informer?

It must be borne in mind that this is not a case where we are adhering to a construction of a statute which has been continuously applied over its long life. In such event I should not unlikely join with my colleagues. This, however, is the case of a new construction upon an eighty-year-old statute, one so farfetched that no member of the bar has ever before ventured to offer it in any reported case.[2] I would hold that the rich rewards of this kind of proceeding are reserved for those who actually and in good faith have contributed something to the enforcement of the law and the protection of the United States.

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[2] Cf. United States v. Cooper Corp., 312 U. S. 600, 613-614.